

Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship

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# MEXICAN CHILDREN OF U.S. CITIZENS: “VIGES PRIN” AND OTHER TALES OF CHALLENGES TO ASSERTING ACQUIRED U.S. CITIZENSHIP

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I. Introduction.....	584
II. Extraordinary Migration and Pitfalls for Mexican Applicants .....	592
A. Mexican Migration Patterns .....	594
B. Mass “Repatriations” .....	598
C. Immigration History .....	601
1. Birth and Citizenship .....	603
2. Accounts of Presence or Residence .....	606
III. Substantive and Procedural Requirements for Acquired Citizenship .....	607
A. Constitutional and Statutory Basis for U.S. Citizenship .....	607
1. Statutory Provisions for Acquisition of Citizenship at Birth .....	609
2. Constitutional Foundation .....	612
B. Standards and Procedures for Asserting Claims to Acquired Citizenship .....	617
1. Applications for Certificate of Citizenship .....	618
2. Citizenship Asserted Before the Department of State .....	619
3. Removal Proceedings .....	620
C. Federal Court Review .....	622
1. Early Judicial Review .....	623
2. Declaratory Judgment .....	624

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3. Review of Removal Orders .....	625
IV. Asserting Claims Before DHS and DOS .....	628
A. Citizenship Claims in CIS .....	629
1. Birth in the United States .....	631
2. Evidence of Presence .....	634
B. Citizenship Claims Before the Department of State ..	637
C. Citizenship Claims Ignored .....	639
V. Asserting Claims Before the Immigration Court .....	643
A. Citizenship Claims in Removal Proceedings .....	644
B. Increased Enforcement .....	647
C. Removal of Citizens .....	651
VI. Extraordinary Migration and Unrelenting Removal .....	654
A. Reinstatement of Removal .....	658
1. Procedures and Lack of Protections .....	658
a. Court Challenges .....	663
B. Changes in Judicial Review .....	665
1. Review of Reinstatement Orders .....	666
2. Habeas Post-REAL ID .....	669
3. Forward to <i>Boumediene v. Bush</i> and Back to <i>Ng Fung Ho</i> .....	672
VII. Conclusion .....	675

## I. INTRODUCTION

Following changes in U.S. immigration law through the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>1</sup> the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>2</sup> and implementation of enforcement measures such as Secure Communities,<sup>3</sup> the number of individuals removed from the United States has swelled dramatically. During the ten-year period from fiscal year 1997 through the end of fiscal year 2006, the Immigration and Naturalization Service (INS) and its suc-

1. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214.

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009.

3. The Secure Communities program began in March 2008 under the George W. Bush administration and continues under the Barack Obama administration. AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW AND SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1 (Oct. 2011). Similar to the earlier program under 287(g), Secure Communities links local law enforcement agencies with the Department of Homeland Security and has increased the number of individuals placed in removal proceedings. *Id.*; Michelle Mittelstadt et al., MIGRATION POL'Y INST., *Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11*, at 11 (Aug. 2011), available at [http://www.migrationpolicy.org/pubs/FS23\\_Post-9-11policy.pdf](http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf).

cessor agency, the Department of Homeland Security (DHS),<sup>4</sup> removed 1,994,188 individuals from the United States.<sup>5</sup> In fiscal year 2010, the number removed totaled 387,242,<sup>6</sup> and thirty-four percent were removed under the expanded authority of the government to reinstate prior orders of deportation or removal.<sup>7</sup>

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4. Under the Homeland Security Act of 2002, federal agencies were restructured. Immigration enforcement was combined with customs enforcement and then re-divided. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101). The Immigration and Naturalization Service (INS) became part of the new Department of Homeland Security, and the functions of the legacy INS—both service and enforcement—were divided between three sub-agencies: Citizenship and Immigration Services (CIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). T. ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 270 (6th ed. 2008) [hereinafter *IMMIGRATION AND CITIZENSHIP*]; *accord* Homeland Security Act of 2002.

5. This is nearly a 400 percent increase in removals from the previous decade's yearly average (FY1987–FY1996). OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 94 (Aug. 2011), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf) [hereinafter 2010 YEARBOOK OF IMMIGRATION STATISTICS] (tallying number of removals broken down by year as follows [YR: # individuals removed]: 1987: 24,336; 1988: 25,829; 1989: 34,427; 1990: 30,039; 1991: 33,189; 1992: 43,671; 1993: 42,542; 1994: 45,674; 1995: 50,924; 1996: 69,680; 1997: 114,432; 1998: 174,813; 1999: 183,114; 2000: 188,467; 2001: 189,026; 2002: 165,168; 2003: 211,098; 2004: 240,665; 2005: 246,431; 2006: 280,974; 2007: 319,382; 2008: 359,795; 2009: 395,165). The number of removals does not include individuals that left the United States under a voluntary departure program offered by DHS; this number varies considerably but from FY1990 through FY2006 the average number of returns per year exceeded 1 million people. *Id.* This number has since been decreasing beginning in FY2007. *Id.* (tallying number of returns broken down by year as follows [YR: # individuals returned]: 1990: 1,022,533; 1991: 1,061,105; 1992: 1,105,829; 1993: 1,243,410; 1994: 1,029,107; 1995: 1,313,764; 1996: 1,573,428; 1997: 1,440,684; 1998: 1,570,127; 1999: 1,574,863; 2000: 1,675,876; 2001: 1,349,371; 2002: 1,012,116; 2003: 945,294; 2004: 1,166,576; 2005: 1,096,920; 2006: 1,043,381; 2007: 891,390; 2008: 811,263; 2009: 586,164; 2010: 476,405).

6. *Id.*

7. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., *IMMIGRATION ENFORCEMENT ACTIONS: 2010*, at 1 (June 2011), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> [hereinafter *IMMIGRATION ENFORCEMENT ACTIONS: 2010*] (identifying that out of the 387,000 orders of removals in year 2010, 131,000 were from reinstatements of final orders); *accord* *Morales-Izquierdo v. Gonzalez*, 486 F.3d 484, 487–88 (9th Cir. 2007) (acknowledging that until 1997 only immigration judges could reinstate removal orders, but upholding the Attorney General's extension of this authority to low-level immigration officers). Federal regulation states that:

An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances.

8 C.F.R. § 241.8(a) (2006).

This campaign against non-citizens has led to the removal of United States citizens.<sup>8</sup> Particularly vulnerable to removal are individuals who were born abroad but claim citizenship through a U.S. citizen parent.<sup>9</sup> Termed “second class citizens” by one Supreme Court justice in a response to their protections under the law,<sup>10</sup> these individuals rely on U.S.

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8. A U.S. citizen, regardless of the manner by which the individual became a citizen and regardless of any past misconduct, should never be subject to removal. 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.03(2) (Matthew Bender, rev. ed. 2011). Notwithstanding, reports have surfaced of U.S. citizens having been detained and removed. See *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 4–34 (2008) (testimony of Rep. Zoe Lofgren (D-Cal.)), available at <http://judiciary.house.gov/hearings/printers/110th/40742.PDF> [hereinafter *Hearing*] (providing testimony of a DHS officer and attorneys regarding the detention and removal by DHS of U.S. citizens); KOHLI ET AL., *supra* note 3, at 2; Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011); Marisa Taylor, *Feds Admit Mistakenly Jailing Citizens as Illegal Immigrants*, HOUS. CHRON., Feb. 14, 2008, at A8.

9. The government has failed to implement screening and notice provisions that would detect individuals who have acquired citizenship through a U.S. parent. Furthermore, the government frequently treats acquired citizens as non-citizens due to their birth abroad even when they have evidence of the acquisition of citizenship. See *Hearing*, *supra* note 8, at 40–66 (testimony of Kara Hartzler, an attorney with the Florence Immigrant and Refugee Rights Project, who sees forty to fifty cases per month of individuals with potential claims to citizenship); see Lauren Etter, *Immigration Twist Gives a Laborer a Fresh Beginning*, WALL ST. J., May 12, 2006, at A1 (describing narrative of Wilfredo Garza, who acquired citizenship through his U.S. citizen father; he was deported under the government's authority to reinstate prior orders of deportation even after filing an application for certificate of citizenship); see also Cara Anna, *Deported Man Was Actually U.S. Citizen*, WASH. POST, August 23, 2006, [http://www.washingtonpost.com/wp-dyn/content/article/2006/08/23/AR2006082300277\\_p](http://www.washingtonpost.com/wp-dyn/content/article/2006/08/23/AR2006082300277_p) (sharing the story of Duarnis Perez who was not informed of his U.S. citizenship until after his deportation); see also *infra* Part IV.C for a discussion of cases of individuals who acquired U.S. citizenship and were removed. Many cases are similar to that of Wilfredo Garza and are discovered by federal public defenders during prosecutions for federal immigration related criminal offenses. Some are able to then obtain recognition of their acquired citizenship.

10. *Rogers v. Bellei*, 401 U.S. 815, 839 (1971) (Black, J., dissenting). Justice Black opined that the majority opinion imposed a lesser status to acquired citizens than on citizens born in the United States. *Id.* The term “second class citizens” has also been used to describe denial of rights to certain classes of citizens throughout American history. Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1305–06 (2002). For example, after the passage of the Fourteenth Amendment, African-Americans remained disadvantaged in nearly every socio-economic sphere. *Id.* Furthermore, in removal cases involving non-citizen parents, their U.S. citizen children are generally not considered to meet the hardship standards required to avoid the parents' removal, which raises the question of the constitutional protections afforded U.S. citizen children. See generally Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988) (arguing that the United States may have gone too far in some of its attempts to control illegal immigration); John Castro,

nationality laws that are based on the principle of *jus sanguinas*,<sup>11</sup> the transmission of citizenship from a U.S. citizen parent to a child born abroad.<sup>12</sup>

In this Article, I will focus on Mexicans who have a U.S. parent and a claim to acquired U.S. citizenship. Their experiences will be illustrated by referencing cases that have arisen on the border between the United States and Mexico and have been handled by law students and Federal Public Defenders.<sup>13</sup> Frequently, individuals who claim to have acquired citizenship in the United States can trace their family background to the early twentieth century and their narratives take us through a long and continuous history of Mexican migrations to the United States, the U.S. government's mass deportations of Mexicans during the Great Depression, and the plight of the U.S.-born children who accompanied the migrants to Mexico.<sup>14</sup> Many of the children who were born in the United

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Note, *Second-Class Citizens: The Schism Between Immigration Policy and Children's Health Care*, 37 HASTINGS CONST. L. R. 199 (2009) (illustrating how children's health care is an indirect method used by the government to discourage the flow of undocumented immigrants).

11. "*Jus Sanguinas* [Latin 'right of blood']: the rule that a child's citizenship is determined by the parents' citizenship." BLACK'S LAW DICTIONARY 880 (8th ed. 2004); see *infra* note 34.

12. Under U.S. law Congress retains the power to confer U.S. citizenship to children born abroad to U.S. citizen parents. See *infra* Part III.A. Beginning in 1790 Congress enacted a series of statutes which set the terms and conditions for transmission of citizenship. The present statutes governing acquisition of citizenship at birth through U.S. citizen parents, and the focus of this article, are found in the Immigration and Nationality Act of 1952 (INA) §§ 301(c), (g), and (h), 8 U.S.C. § 1401 (c), (a), and (h), and INA § 309, U.S.C. § 1409. *Id.* There are also statutes providing for transmission of citizenship through parents who are U.S. nationals and for citizenship of individuals and their children born in territories and possessions. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, §§ 301-309, 66 Stat. 163, 235-239 (codified at 8 U.S.C. §§ 1401-1409). Additionally, citizenship may be transmitted to the children after birth (derivative citizenship). INA §§ 320, 322, 8 U.S.C. §§ 1431, 1433. See *infra* note 119.

13. Many of the cases cited in this Article were handled by law students enrolled in the Immigration and Human Rights Clinic of St. Mary's University School of Law located in San Antonio, Texas. The law school's proximity to the U.S.-Mexico border provides faculty and students with multiple opportunities to represent individuals with claims to U.S. citizenship and an understanding of the significant obstacles these claimants now face following the 1996 legislation. See *The Center for Legal and Social Justice: The Immigration and Human Rights Clinic Course*, ST. MARY'S UNIV., <http://www.stmarytx.edu/law/index.php?site=centerForLegalAndSocialJustice#immigrationHumanRightsClinic> (last visited Jan. 23, 2012) (homepage of the Center for Legal and Social Justice). The names of the Clinic clients discussed in this Article are represented by initials to maintain confidentiality and all information regarding these cases can be obtained by contacting the Clinic directly.

14. Kevin Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 4-5 (2005).

States were raised in Mexico and then became the parents of another generation of U.S. citizens by acquisition.<sup>15</sup>

There are both historic and current challenges faced by these individuals. This Article addresses the claims presented under statutes, which set the conditions for these children born abroad and the challenges presented in proving the claims. Transmission of citizenship from a U.S. citizen parent is determined by the statute which was in effect at the time of birth of the child,<sup>16</sup> and the child can either be born abroad 1) to two U.S. citizen parents,<sup>17</sup> 2) to one U.S. parent and one non-citizen parent,<sup>18</sup>

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15. Children who are born in Mexico to a U.S. citizen parent and who acquire U.S. citizenship under U.S. law are dual citizens. They are citizens of Mexico by birth and also citizens of the United States through their parents. Many of their U.S. citizen parents are also dual citizens. They obtained U.S. citizenship by birth in the United States and under Mexican law they also acquired Mexican citizenship through their Mexican-citizen parent(s). *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 147 (1963); Manuel Becerra Ramirez, *Nationality in Mexico*, in *FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD* 316 & n.6 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000) (identifying that under the Mexican Constitution of 1857, Mexican nationality is established under both principles of *jus soli* and *jus sanguinis*). Large-scale migration of Mexicans to the United States and the citizenship laws in Mexico and the United States led to this complicated dual-citizenship phenomena. T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in *FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD*, *supra*, at 120 [hereinafter Aleinikoff]; Peter Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1418 (1997).

16. *Drodz v. INS*, 155 F.3d 81, 86 (2d Cir. 1998). Since 1790, Congress has passed a number of statutes setting the terms and conditions for transmitting citizenship from a U.S. citizen parent to a child born abroad. See DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK 2011-2012 § 2:1 (Charles Roth ed., 2011) (outlining the historical development of immigration laws as they apply to acquired citizenship). See also 7 GORDON, *supra* note 8, at § 99.04 (providing a detailed presentation of the requirements for acquisition of citizenship under each of the statutes); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1499 app. B (12th ed. 2010) (providing tables listing the statutory requirements for acquisition of citizenship).

17. The present statute at INA § 301(c), 8 U.S.C. § 1401(c), provides:

The following shall be nationals and citizens of the United States at birth:

. . . .

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person . . . .

8 U.S.C. § 1401(c) (2006).

18. Children of one U.S. parent and one non-citizen parent apply under INA §§ 301(g) and (h), 8 U.S.C. §§ 1401 (g) and (h), which provides:

[t]he following shall be nationals and citizens of the United States at birth:

. . . .

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United

or 3) out of wedlock to one U.S. citizen parent.<sup>19</sup> At a minimum, each

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States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *[p]rovided*, that any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical present requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and (h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

8 U.S.C. § 1401(g), (h) (2006).

19. INA § 309 provides the requirements for a child born abroad and out of wedlock to one U.S. citizen parent and a non-citizen parent. INA § 309, 8 U.S.C. § 1409 (2006). A U.S. citizen father of a child born out of wedlock must first meet the requirements of INA § 301(g), 8 U.S.C. § 1401(a), and then must meet the following additional requirements established under INA § 309(a) as listed below:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
  - (A) the person is legitimated under the law of the person's residence or domicile,
  - (B) the father acknowledges paternity of the person in writing under oath,
  - (C) the paternity of the person is established by adjudication of a competent court.

INA § 309, 8 U.S.C. § 1409 (2006). U.S.C. § 1409 also reduces the physical presence requirement for a U.S. citizen mother of a child born abroad and out of wedlock. *Id.* The statute states the following:

- (c) [n]otwithstanding the provision of subsection (a) of this section, a person born after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

*Id.* 8 U.S.C. § 1409 has been subject to challenge because the requirements placed on the child born out of wedlock to a U.S. citizen father differs from those born out of wedlock to a U.S. citizen mother. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001) (ruling that the requirements of the statute imposed on U.S. fathers to establish paternity and legitimacy met a standard substantially related to a government interest; and therefore, did not violate the equal protection clause of the Fifth Amendment). The Court also affirmed the Ninth Circuit's determination that the statute was valid when challenged on equal protec-



statute requires that the child who asserts a claim to acquired citizenship present evidence that the U.S. parent was a U.S. citizen at the time of birth, and maintained the required residence/presence in the United States prior to the birth of the child.<sup>20</sup> For many Mexicans who claim acquisition to U.S. citizenship, these two elements present complex factual questions and evidentiary challenges<sup>21</sup> that have been difficult to prove on the fluid border between the United States and Mexico.<sup>22</sup>

The agencies charged with adjudication of citizenship claims in the United States, the DHS and the immigration courts under the Department of Justice Executive Office for Immigration Review (EOIR), are over-burdened with cases and ill equipped to handle the claims.<sup>23</sup> Some government officials are unreceptive or hostile to claimants who have sparse documentary evidence.<sup>24</sup> Even though many U.S. parents and their children born abroad are unaware of laws regulating acquired citizenship status, the government has taken few affirmative steps to advise likely candidates for citizenship. The statute and regulations governing removal procedures provide no guarantee that individuals with possible claims to acquisition of U.S. citizenship will be discovered or advised of a

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tion grounds. *United States v. Flores-Villar*, 536 F.3d 990, 997 (9th Cir. 2008), *aff'd*, 564 U.S. \_\_\_, 131 S. Ct. 2312 (2011) (per curiam). In *Flores-Villar*, petitioner argued that the physical presence requirements that the father must meet prior to the birth of the out of wedlock child, a total of five years at least two of which must be after the age of fourteen, was a requirement which exceeds the one-year physical presence an out of wedlock mother must establish. *Id.* at 995. The Ninth Circuit ruled that the requirements imposed on fathers were rationally related to the government's interest in establishing a relationship between the U.S. citizen parent and child. *Id.* at 996–97.

20. INA §§ 301(g) and (h), 8 U.S.C. §§ 1401(g) and (h).

21. See *infra* Parts II.B, IV.A. Besides issues involving the U.S. parent's citizenship and residence/presence in the United States, questions of paternity and legitimacy arise in cases concerning a child born abroad and out of wedlock to a U.S. citizen father. *Tuan Ahn Nguyen*, 533 U.S. at 57. Additionally, early statutes contained retention provisions which required that the child come to the United States and maintain residence for a period of time. See LEVY, *supra* note 16, at § 4:13 (discussing how the retention requirements, conditions subsequent, were upheld because of concerns with dual citizenship and loyalty to the United States). The retention requirements have since been repealed. See *infra* Part III.A.I.

22. The burden of proof is on the child born abroad to establish that he or she meets the conditions precedent to acquiring citizenship at birth by preponderance of the evidence. 8 C.F.R. § 341.2(c) (2010); *In re Tijerina-Villareal*, 13 I&N Dec. 327, 330 (B.I.A. 1969).

23. See Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 597 (2009) (describing the problems with the civil immigration adjudication system). During fiscal year 2008, approximately 230 immigration judges presided over 350,000 matters. *Id.* at 599. See *infra* Part V.

24. See *infra* Part IV.

claim.<sup>25</sup> Consequently, it is not uncommon that children born abroad to U.S. parents are deported or removed<sup>26</sup> from the United States, sometimes repeatedly, despite the fact that they are U.S. citizens.

Amendments to the immigration statutes in 1996 brought about a dramatic increase in removals and instituted new systemic obstacles for individuals born abroad with claims to U.S. citizenship.<sup>27</sup> In combination, AEDPA and IIRIRA created the following changes: increased the grounds of removal particularly for non-citizens with criminal offenses,<sup>28</sup> mandated detention of criminal non-citizens,<sup>29</sup> and authorized government officers to reinstate prior orders of deportation and removal.<sup>30</sup> Difficulties that the purported U.S. citizen had historically in establishing a claim to acquired citizenship became compounded by the heightened demands of the AEDPA and IIRIRA. Furthermore, AEDPA and IIRIRA narrowed the availability of federal court review of removal orders<sup>31</sup> and in 2005 Congress passed the REAL-ID Act which purports to eliminate

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25. The government has no authority to deport or remove a U.S. citizen, so to order a deportation or removal without clarifying the status of an individual with a claim to U.S. citizenship “is thus a denial of an essential jurisdictional fact.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *accord* *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2005). However, the INA and the regulations do not require that the immigration judge ask the respondent in removal proceedings whether he or she has a United States citizen parent or grandparent. *See* 8 C.F.R. § 1240.10 (laying out the requirements of the immigration judge in a removal proceeding). EOIR only advises immigration judges to inquire of unrepresented respondents whether they have U.S.-citizen parents or grandparents. *See also* *EOIR Immigration Court Bench Book, Master Calendar Checklist for the Immigration Judge*, <http://www.justice.gov/eoir/vll/benchbook/tools/Script%20MC%20Checklist.htm> (last visited Feb. 23, 2012) (providing directions on the proper way to conduct an immigration hearing, including a question about U.S. parents or grandparents). *See infra* Part V.A.

26. IIRIRA marked the shift from the term “deport” to the term “remove.” Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1441–42 (1997). Prior to 1997, legacy INS instituted exclusion and deportation proceedings, depending on whether the grounds of inadmissibility or deportability applied. *Id.* IIRIRA consolidated the two forms of proceedings into one category: removal proceedings. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. 104-208, § 304, 110 Stat. 3009.

27. In 1996, there were 69,680 individuals removed from the U.S., then in 1997 that number jumped to 114,432 individuals. 2010 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 5, at 94.

28. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, §§ 435, 440, 110 Stat. 121; IIRIRA, §§ 321, 322, 344, 347, 350 (codified within INA § 212(a), 8 U.S.C. § 1182(a) and INA § 237(a), 8 U.S.C. § 1227(a)).

29. IIRIRA § 305 (codified at INA § 236(a)(1), 8 U.S.C. § 1226(a)(1) (2006) (instructing that certain individuals who are inadmissible and deportable on crime-based grounds shall be taken into custody).

30. IIRIRA § 305 (codified at INA § 241(a)(5), 8 U.S.C. § 1231(a)(5)).

31. AEDPA, §§ 440-442 (modified former INA § 106, 8 U.S.C. § 1105a); IIRIRA § 306 (repealed INA § 106, 8 U.S.C. § 1105a and established INA § 242, 8 U.S.C. § 1252).

access to habeas corpus proceedings for review of removal orders.<sup>32</sup> Acquired citizenship claimants find themselves unable to obtain judicial review of reinstatement of prior deportation and removal orders when they seek to assert previously unresolved citizenship claims.

Part II of this Article outlines the patterns and continuity of Mexican migration and will discuss in more detail the cases that illustrate the problems faced by many Mexicans with viable claims to U.S. citizenship. Part III discusses the history of and substantive requirements for the acquisition of citizenship through a U.S. citizen parent and describes the provisions for judicial review. Part IV details the obstacles encountered by individuals seeking to assert claims to citizenship before the government agencies authorized to adjudicate applications asserting citizenship claims. Part V outlines problems faced by citizenship claimants in removal proceedings, particularly following the changes occasioned by AEDPA and IIRIRA. Part IV discusses the dangers of reinstatement of removal for citizenship claimants and the limitations placed on judicial review of removal orders by the REAL ID Act. In the Conclusion, I will make recommendations for change to ensure full protections for individuals born abroad who present non-frivolous claims to U.S. citizenship.

## II. EXTRAORDINARY MIGRATION AND PITFALLS FOR MEXICAN APPLICANTS

Citizenship by birth is generally based on one of two principles. Citizenship can be conferred under *jus soli* (law of land, or birth on land) to those born within the boundaries of a nation.<sup>33</sup> Alternatively, under the principle of *jus sanguinas* (law of blood or descent) citizenship is inherited from a parent who is a citizen.<sup>34</sup> The United States has adopted both principles to support citizenship at birth.<sup>35</sup> In his article concerning family influence on immigration, Professor Motomura discussed the impact of U.S. born children of immigrants and how “immigration is a matter of

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32. REAL-ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified at various sections within INA § 242, 8 U.S.C. § 1252).

33. *Jus soli* is based on the English common law principle of nationality, which “embraced all persons born within the king’s allegiance and subject to his protection.” *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898).

34. *Jus sanguinas* is of European origin. LEVY, *supra* note 16, at § 4.1. Nationality by descent was adopted in France following the French Revolution and was the norm in a number of other countries including Germany, Switzerland, Sweden, and Norway. *Id.*

35. *Wong Kim Ark*, 169 U.S. at 665–66; *cf.* IMMIGRATION AND CITIZENSHIP, *supra* note 4, at 15 (the principle of *jus solis* is a foundation for Anglo-American nationality law, but both *jus solis* and *jus sanguinas* are basic principles for obtaining citizenship at birth).

multiple generations.”<sup>36</sup> Citizenship is also a matter of multiple generations, and the two principles of citizenship at birth, *jus soli* and *jus sanguinas*, have a profound and continuing influence on U.S. law and policy.<sup>37</sup>

The extraordinary migration of Mexicans to the United States gives some historic foundation for many *jus soli* and *jus sanguinas* citizens of the United States.<sup>38</sup> For over one hundred years, Mexican workers and their families, including their U.S.-born children, have migrated between Mexico and the United States.<sup>39</sup> They have also been the subject of repeated episodes of mass deportations from the United States to Mexico.<sup>40</sup> New generations of Mexican children with U.S. citizen parents often trace their ancestry from the circular migration patterns of these families.

However, for many of the children born in Mexico to a U.S. citizen parent, establishing a claim to the acquisition of U.S. citizenship poses

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36. Hiroshi Motomura, *We Asked for Workers, But Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 108 (2006).

37. Aleinikoff, *supra* note 15. The *jus soli* citizenship of children born in the United States to undocumented individuals has become a source of controversy in recent years. *Id.* Proposals to amend the Constitution to limit U.S. citizenship to the children of lawfully admitted non-citizens have been argued but rejected. Motomura, *supra* note 36, at 111–12; Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 54–56 (1997).

38. See DAVID SPENER, *CLANDESTINE CROSSINGS: MIGRANTS AND COYOTES ON THE TEXAS-MEXICO BORDER* 26 (2009) (“[T]he sheer scale of Mexican migration to the United States sets it apart from migration from all other nations” and the populations of Mexicans in the U.S. and former migrants living in Mexico combine to form “the largest contemporary migration between any two countries in the world.”); MARC R. ROSENBLUM, *OBSTACLES AND OPPORTUNITIES FOR REGIONAL COOPERATION: THE US-MEXICO CASE* 6 (Apr. 2011), available at <http://www.migrationpolicy.org/pubs/USMexico-cooperation.pdf> (examining the idea of collaboration regarding the immigration issues with the United States and Mexico, but noting the problems that may arise).

39. See Jorge Durand, *From Traitors to Heroes: 100 Years of Mexican Migration Policies*, MIGRATION INFORMATION SOURCE, available at <http://www.migrationinformation.org/feature/display.cfm?ID=203> (last visited Apr. 25, 2012), (noting that the massive migration of Mexicans to the United States as well as the counter migration by Mexicans returning to Mexico in the 19th century following the U.S. annexation of southwest territories once part of Mexico and in the 20th century following expulsions during U.S. economic crisis). See also MARC R. ROSENBLUM & KATE BRICK, REG'L MIGRATION STUDY GRP., *US IMMIGRATION POLICY AND MEXICAN/CENTRAL AMERICAN MIGRATION FLOWS: THEN AND NOW* 1 (Aug. 2011) (discussing how the migrant flow between the United States and Mexico is deeply established and how illegal migration became the primary movement from Mexico into the United States).

40. Durand, *supra* note 39. The United States conducted massive expulsions of migrant workers during the economic crises of 1907, 1921, 1929, and 1939. *Id.*

significant obstacles.<sup>41</sup> The first challenge concerns the ability of applicants to gather evidence of their claim that at the time of their birth, the transmitting parent was a U.S. citizen and had lived in the United States for the required period of time.<sup>42</sup> Many of the U.S. citizen parents were like the previous generation of migrants; they traveled between Mexico and far-flung regions of the United States and often lacked the kind and volume of records that readily established U.S. birth and presence.

#### A. Mexican Migration Patterns

The proximity of Mexico to the United States and the close ties between the two nations contribute to Mexicans representing the largest immigrant group in the United States.<sup>43</sup> The patterns and continuity of migration from the end of the nineteenth century to the present also contribute to the formation of what is believed to be the largest group of individuals who acquire citizenship at birth, Mexicans with a U.S. citizen parent.<sup>44</sup>

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41. See Hernán Rozemberg, *Citizenship Cases Complex, Trying*, SAN ANTONIO EXPRESS NEWS, July 5, 2005, at 1B, 4B (illustrating how an applicant for acquisition of citizenship spent a decade trying to prove his case to DHS).

42. *Alvarez-Garcia v. Ashcroft*, 293 F.3d 1155, 1156 (9th Cir. 2002); see also *infra* Part II.B.

43. The ties of Mexico to the United States have a long and complicated history—unlike other immigrant groups, Mexicans occupied territory that was annexed by the United States. CAREY MCWILLIAMS, *NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES* 207 (1968); SPENER, *supra* note 38, at 32–33. Under every category, Mexicans represent the largest of immigrant groups in the United States. 2010 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 5. Mexicans are the dominant group facing enforcement under immigration laws; more Mexicans than any other group are removed from the United States. *Id.* In FY 2010, 387,242 individuals were removed from the United States and 282,003 (almost seventy-three percent) of them were Mexicans. *Id.* at 94, 103. In FY 2010, Mexicans accounted for eighty-three percent of the individuals apprehended by DHS. IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 7, at 1. And, more Mexicans than any other nationality are subject to removal proceedings in immigration court. 2010 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 5, at B2.

44. The application form, the N-600, is used by those individuals applying under INA § 301(c) and (g), 8 U.S.C. § 1401(c) and (g), and INA § 309, 8 U.S.C. § 1409. It is required for applicants to list both their country of birth and their country of prior nationality on the N-600 form. *N-600, Application for Certificate of Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS., available at <http://www.uscis.gov/files/form/n-600.pdf> (last updated Feb. 2, 2012). However, currently DHS does not track statistics from filed N-600s, although new filing procedures for N-600s were initiated in Oct. 2011 and the data from the N-600s, including the applicant's place of birth, will be recorded by DHS. See Email from Albert W. Blake-way, CIS Field Office Dir., to Lee Terán, Clinical Professor of Law, St. Mary's Univ. Sch. of Law (Sept. 21, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Although currently unsupported by statistical evidence, given that Mexican nationality is identified as the overwhelming majority in most immigration statistics that are currently being tracked, it is likely that Mexicans are the majority of acquired citizens in

The modern migration of Mexicans to the United States began in the late 1800s when U.S. employers sought Mexican labor as part of the development of the southwest United States.<sup>45</sup> Mexican workers were recruited for the construction of railroads and in the mining industry, and agricultural development in the southwest was largely dependent on Mexican labor.<sup>46</sup> During World War I, the need for Mexican labor intensified, and workers continued to fill jobs in the agricultural and railroad industries and also moved into industrial jobs in the urban centers of the United States.<sup>47</sup>

The migration of Mexicans continued in earnest when revolution and economic instability drove hundreds of thousands of Mexicans to the United States. Beginning in approximately 1910, over one million Mexicans, ten percent of the population in that country, settled in the United States where they found jobs in the growing industries of the Southwest.<sup>48</sup> The Mexican migrants were encouraged and welcomed not only by employers but by religious groups. The Catholic Church in particular opposed the anti-clericalism of the Mexican revolutionaries and favored large scale Mexican immigration to strengthen and expand the church in sparsely populated areas of the southwest.<sup>49</sup>

Not all Americans supported the Mexican migrants. Hostility toward Mexicans grew in concert with opposition to other immigrant groups in the late nineteenth and early twentieth century. The nativist movement grew from those who advocated for racial and ethnic purity. They favored restrictions on new immigrant groups that the nativists considered inferior to northern European Protestants and unwilling to assimilate to the

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the United States. *See supra* note 43. However, the N-600 form is also used by applicants who are derivative citizens applying under INA §§ 320, 322, 8 U.S.C. §§ 1431, 1433. *See infra* note 119. The Child Citizenship Act of 2000 liberalized the requirements for obtaining derivative citizenship through a U.S. parent and has caused a substantial increase in the number of children now eligible for derivative citizenship under INA §§ 320, 322. Child Citizenship Act of 2000, Pub. L. 106-395, 114 Stat. 1631 (codified at 8 U.S.C. §§ 1431–33 (2006)).

45. *See* McWILLIAMS, *supra* note 43, at 168–73 (stating that early migrants were recruited to work in areas such as railroad construction and cotton production); SPENER, *supra* note 38, at 28–33, 37–38 (explaining how and why the South Texas border became a vital migratory corridor between the United States and Mexico).

46. Richard D. Vogel, *Stolen Birthright: The U.S. Conquest and Exploitation of the Mexican People*, HOUS. INST. FOR CULTURE, <http://www.houstonculture.org/hispanic/conquest5.html> (last visited Feb.18, 2012).

47. SPENER, *supra* note 38, at 38 (2009); Vogel, *supra* note 46.

48. LAWRENCE A. CARDOSO, MEXICAN EMIGRATION TO THE UNITED STATES 1897–1931: SOCIO-ECONOMIC PATTERNS 38 (1980); McWILLIAMS, *supra* note 43, at 163.

49. CARDOSO, *supra* note 48, at 131. Protestants also welcomed Mexican migrants, as the missionaries saw the migration of Mexicans as an opportunity for additional converts. *Id.*

American culture. Mexicans received the same treatment and criticism that other minority and immigrant groups endured.<sup>50</sup> In response to public pressure to limit immigration, Congress acted to impose new restrictions. In 1882 Congress targeted Asians with the enactment of the virulently racist Chinese Exclusion Act.<sup>51</sup> After several attempts to limit the entry of illiterate migrants, Congress passed the Immigration Act of 1917 that imposed a head tax on immigrant workers and a literacy test to exclude unskilled laborers from the United States.<sup>52</sup> Then, to restrict immigration to ethnic and national levels of the nineteenth century, Congress passed legislation to establish fixed immigration quotas which favored immigration of Northern Europeans.<sup>53</sup> In 1921, the first statute was passed as a temporary legislation to prevent Europeans from flooding the United States after World War I.<sup>54</sup> A few years later Congress adopted the Immigration Act of 1924, which set a quota of two percent for each country of origin based on the census of 1890.<sup>55</sup> The result was the virtual elimination of unskilled laborers from Southern Europe and Asia.<sup>56</sup>

Western Hemisphere immigrants, including Mexicans, were exempt from the quota laws.<sup>57</sup> Nativists continued to call for limits on Mexican immigration, and each year from 1926 to 1930 they introduced legislation in Congress to include Mexicans in the quota laws.<sup>58</sup> But, their efforts were largely unsuccessful due to the strong support of Mexican laborers by employers and religious groups. In fact, the restrictions on immigra-

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50. See McWilliams, *supra* note 43, at 169–173 (recounting the discrimination against and mistreatment of Mexican workers); FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s* at 10–12 (2006) (discussing the negative treatment encountered by the Mexican immigrants).

51. See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58–61 (excluding Chinese immigrants). See also Act of Mar. 3 1875, ch. 140, 18 Stat. 477 (criminalizing the importation of Asians to the United States); *Chae Chan Ping v. United States*, 130 U.S. 581, 582–83 (1889) (denying entry to a Chinese laborer who returned to the United States after the passage of the Act of 1882); 2 GORDON, *supra* note 8, at § 17.02(2) (providing a legislative background on the Chinese Exclusion Acts).

52. CARDOSO, *supra* note 48, at 46; SPENER, *supra* note 38, at 38.

53. 3 GORDON, *supra* note 8, at § 31.01(1).

54. Pub. L. 67-6, ch.8, § 2, 42 Stat. 5 (1921) (often referred to as the Emergency Quota Act, capping immigration at three percent of a nation's population); 3 GORDON, *supra* note 8, at § 31.01(1); CARDOSO, *supra* note 48, at 83.

55. Immigration Act of 1924, Pub. L. No. 68-139, ch. 8, 43 Stat. 153; 3 GORDON, *supra* note 8, at § 31.01(1).

56. CARDOSO, *supra* note 48, at 83; Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1836–37 (2007).

57. Chacon, *supra* note 56, at 1837. However, Mexicans were targeted for enforcement of other grounds of inadmissibility, such as the literacy and head taxes. *Id.* at 1837 n. 38.

58. CARDOSO, *supra* note 48, at 137.

tion of Asian and Southern European workers depleted the supply of workers and bolstered the need for Mexican labor. Employers representing a range of interests, such as farming, ranching, mining, and tourism, actively lobbied Congress to prevent inclusion of Mexicans within the quota legislation and argued that the economy of the Southwest depended on Mexican labor.<sup>59</sup>

The federal government sided with the employers and the religious organizations that supported the migrants from Mexico.<sup>60</sup> In 1915, the U.S. government determined Mexicans to be refugees and allowed thousands to enter the United States without restrictions.<sup>61</sup> Mexican workers were exempt from the tax and literacy test restrictions issued by the 1917 Act during World War I because employers argued that the labor shortages would hurt the U.S. economy at a critical time.<sup>62</sup> Despite public support for nativist laws, the federal government sided with business interests seeking to recruit more workers and stalled the enforcement of restrictions against Mexicans.<sup>63</sup>

Even though the 1924 Act prohibited the entry of individuals who were more than fifty percent of indigenous blood, the government determined that Mexicans were White in order to prevent the exclusion of Mexicans.<sup>64</sup> The Act of 1924 created the Border Patrol, but there were very few officers and their assignments restricted them to enforcing customs and prohibition laws.<sup>65</sup> Immigration officials also permitted employers to bring workers from Mexico illegally and when the Border Patrol encoun-

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59. *Id.* at 126–27. While U.S. businessmen favored Mexican migration, they were by no means kind to Mexican workers. *See id.* (quoting businessmen who denied wanting Mexicans, but knew they needed them). To assuage the fears of nativist Americans, they portrayed Mexicans as non-threatening and docile. *Id.* Employers stated that Mexicans were apolitical, “content to live under the rule of American political bosses,” and were physically suited to “withstand high temperatures and carry out stoop labor.” *Id.* at 125. John Nance Garner, a Texas representative, stated that while Mexicans were inferior to whites they were not a threat because of a genetic disposition to return to their home country. *Id.*

60. *Id.* at 47. The border during the 1920s was “fairly porous . . . [f]amilies often walked across the border without stopping at the immigration office.” YOLANDA CHAVEZ LEYVA, *CHILDREN ON THE BORDER 1880–1930*, at 3 (2001).

61. CARDOSO, *supra* note 48, at 44.

62. *Id.* at 47. Also, it is reported that “for every Mexican who entered the United States with proper documents during the 1920s, as many as five entered without them.” SPENER, *supra* note 38, at 38.

63. CARDOSO, *supra* note 48, at 127–29.

64. *Id.* at 129.

65. *Id.* at 84; SPENER, *supra* note 38, at 39; Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States about the Border: The Rhetoric and the Realities*, 5 *INTERCULTURAL HUM. RTS. L. REV.* 241, 267–68 (2010). In the early 20th century “control at the Mexico-U.S. border was episodic and informal.” *Id.* at 267.



tered Mexicans who entered the U.S. illegally, they were not deported if an employer paid for the worker's visa.<sup>66</sup>

By 1910, approximately 200,000 Mexicans resided in the United States, double the number from ten years before, and there were over 100,000 children of Mexicans born in the United States.<sup>67</sup> By 1930, the census recorded 1,422,533 Mexicans living in the United States, most in rural areas in the five Southwest states of Texas, New Mexico, Arizona, California and Colorado.<sup>68</sup> But, the Depression and massive unemployment caused a sharp change in federal and local policy toward Mexican immigration.

#### B. *Mass "Repatriations"*

The exact number of Mexicans and their U.S.-born children who were "repatriated" to Mexico during the Great Depression is not known.<sup>69</sup> Some historians argue that as many as one million Mexicans and their U.S. born children were repatriated to Mexico by 1935.<sup>70</sup> Other scholars have concluded that the number of repatriated Mexicans and Mexican-Americans is around 415,000 individuals.<sup>71</sup> The most conservative estimate is that 355,000 individuals repatriated to Mexico of which about

66. CARDOSO, *supra* note 48, at 129. The Commissioner for Immigration, Harry Hull stated that because of the "heavy dependence on Mexican labor, the strict enforcement of federal laws would only produce acute shortages of manpower and result in serious harm to the local economy." *Id.*

67. *Id.* at 35. Most of the early immigrants throughout the 1920s were young males, but later, women and children followed. *Id.* at 82. "[M]igration is in large part a social process of network building, so it shouldn't surprise anyone that immigrants are husbands and wives, and sons and daughters . . ." Motomura, *supra* note 36, at 103 (internal citations omitted).

68. CARDOSO, *supra* note 48, at 91; McWILLIAMS, *supra* note 43, at 163.

69. ROSENBLUM, *supra* note 38, at 8 & 8 n.29. "Repatriation" is used to describe the efforts to force Mexicans and their families from the United States during the Great Depression. Johnson, *supra* note 14, at 4. It is, as Dean Kevin Johnson states, not "entirely accurate. Federal, state, and local governments worked together to involuntarily remove many U.S. citizens of Mexican ancestry." *Id.*

70. ROSENBLUM, *supra* note 38, at 8 n.29.

71. ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES 1929-1939, at 126 (1974) (using data from the Mexican government sources, he places the total return to Mexico from 1929-1935 at in excess of 415,000); *see also* SPENER, *supra* note 38, at 39 (identifying that between half a million and a million "Mexican immigrants and their U.S. citizen children were 'repatriated' to Mexico"). "With the deterioration of the United States economy after 1929, between 400,000 and 500,000 Mexicans and their American-born children returned to Mexico. More than half of these departed from Texas." Robert R. McKay, *Mexican Americans and Repatriation*, TEX. STATE HISTORICAL ASS'N, <http://www.tshaonline.org/handbook/online/articles/pqmyk> (last visited Jan. 23, 2012).

forty percent were U.S. citizen children.<sup>72</sup> Some migrants and their families returned to Mexico following a common pattern of circular migration.<sup>73</sup> The Mexican government, which had long opposed the mass exodus of young Mexicans to the United States, encouraged Mexican families to return.<sup>74</sup> Mexico established self-help groups and expanded its consular offices in the United States to assist Mexican workers,<sup>75</sup> and during the Depression, these organizations provided aid to the migrants to return to Mexico.<sup>76</sup> However, without question, many of the Mexican workers and their U.S. children were coerced to leave the United States by the federal government, which sharply increased deportations of Mexicans during the 1930s,<sup>77</sup> and by local authorities that rounded up Mexicans and their families and forced them to leave the United States.<sup>78</sup>

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72. See Brian Gratton & Emily Merchant, Mexican Repatriation: New Estimates of Total and Excess Return in the 1930s, at 10, 16 (Population Assn. of Am. Draft Paper 2011), available at <http://paa2011.princeton.edu/download.aspx?submissionId=110199> (noting that Prof. Gratton and Prof. Merchant are critical of the methodology used in earlier studies which resulted in higher estimates of repatriations and support their estimate on data from the U.S. Census).

73. See HOFFMAN, *supra* note 71, at 33–38 (identifying that when the Depression hit, Mexicans were often the first to lose their jobs and, unable to make a living, returned to Mexico); Gratton & Merchant, *supra* note 72, at 16.

74. On the one hand, Mexico opposed the emigration of its workers to the United States. CARDOSO, *supra* note 48, at 30, 55–57. The Mexican government also recognized the benefits the country enjoyed financially from Mexicans workers in the United States and strongly opposed inclusion of Mexicans in the U.S. quota laws. *Id.* at 139; POPULATION ASS'N OF AM., MEXICAN REPATRIATION: NEW ESTIMATES OF TOTAL AND EXCESS RETURN IN THE 1930s, at 5 (2011), available at <http://paa2011.princeton.edu/download.aspx?submissionId=110199>.

75. CARDOSO, *supra* note 48, at 113–14. The Mexican government promoted the establishment of organizations such as the *Comisiones Honorificas* (honorary commissions) to assist Mexicans in the United States who were subject to discriminatory treatment, and also expanded consular offices to accommodate the needs of Mexican workers. *Id.*

76. *Id.* at 148–49. While publicly supporting the return of Mexicans to the homeland, the Mexican economy was unprepared for an influx of families and “[p]rivately consuls were admonished to do all in their power to keep as many workers in the United States as possible.” *Id.* at 148.

77. CARDOSO, *supra* note 48, at 147–48; HOFFMAN, *supra* note 71, at 38–66 (focusing on federal deportation campaign in Los Angeles); POPULATION ASS'N OF AM., *supra* note 74, at 8–9; McKay, *supra* note 71. “Deportation raids were carried out in both urban and rural areas. The most intense activity was conducted near the Texas-Mexico border.” McKay, *supra* note 71.

78. See CARDOSO, *supra* note 48, at 147 (explaining how Mexicans taking advantage of welfare were specifically targeted); LUZ MARIA GORDILLO, MEXICAN WOMEN AND THE OTHER SIDE OF IMMIGRATION: ENGENDERING TRANSNATIONAL TIES 93–94 (2010) (describing repatriation of Mexicans from the Detroit area); HOFFMAN, *supra* note 71, at 83–90 (discussing the repatriation that took place in Los Angeles); McWILLIAMS, *supra* note 43, at 193 (recounting her memories of the repatriation of Mexicans in Los Angeles);

Early twentieth century migration and mass deportations during the Great Depression did not end the Mexican migration to the United States. Mexican migration patterns were repeated after the Depression, through World War II, and up to the present with similar results. Migrants from Mexico responded to economic and labor needs in both countries and settled in the United States.<sup>79</sup> Relaxed U.S. policies toward immigration, both authorized and unauthorized,<sup>80</sup> contribute to the continued growth of Mexican migrants in the United States and another generation of U.S. citizen children.<sup>81</sup> Political and economic changes in the United States create greater restrictions and enforcement, and Mexican immigrants are forced to return to Mexico, often accompanied by U.S. citizen children.<sup>82</sup> The proximity of Mexico to the United States, the size

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see also Johnson, *supra* note 14, at 6–7 (referencing testimonies of U.S. citizens given in the 2003 hearings before the California Senate Select Committee on Citizen Participation).

79. Following the Depression, Mexican migrants again returned to the United States to supply labor needs during and after World War II. Vogel, *supra* note 46. The Bracero Program was instituted in 1942 and about five million Mexicans were recruited to work in the United States. *Id.* “Over time and with extensive movement back and forth, communities of origin and destination increasingly come to comprise transnational circuits—social and geographic spaces that arise through the constant circulation of people, money, goods, and information.” Douglas Massey, et. al., *Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 AM. J. SOC. 1492, 1500 (1994) (internal citations omitted). Migration from Mexico begins with young males, then diversifies to include women and children, and grows to form sizeable communities in the United States. *Id.* at 1500–01.

80. Unauthorized migration went hand in hand with authorized braceros, and in the 1940s and 1950s, South Texas was home for hundreds of thousands of Mexican workers, with the north corridor serving as a mode of transportation into the U.S. interior. SPENER, *supra* note 38, at 40. The Border Patrol continued to deport many migrants, but there was also selective enforcement in support of the agricultural industry. *Id.* at 40–41.

81. It is estimated that there are presently 10.8 million unauthorized individuals in the United States, of which sixty-two percent are Mexican. MICHAEL HOEFER ET. AL., OFFICE OF IMMIGRATION STATISTICS, DEP’T HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, at 1 (Feb. 2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf). It is believed that thirty-nine percent of all illegal immigrants currently in the United States entered after 2000. *Id.* Most unauthorized migrants are young and of child bearing age. PEW HISPANIC CTR., THE MEXICAN-AMERICAN BOOM: BIRTHS OVERTAKE IMMIGRATION 2 (July 2011), available at <http://www.pewhispanic.org/files/reports/144.pdf>.

82. The government launched other efforts following the repatriations of the 1930s which resulted in mass deportations of Mexicans. Johnson, *supra* note 14, at 1–2, 10. “Operation Wetback” was one such campaign that targeted hundreds of thousands of Mexicans and forced their U.S.-born children to accompany them to Mexico. *Id.* at 10. The INS claimed to have removed over one million Mexicans during Operation Wetback; this is more people than were removed during the entire Great Depression. Vogel, *supra* note 46. Some restraint in immigration enforcement was seen during the Civil Rights era in the 1960s and 1970s, but that has been replaced since the 1980s by new enforcement goals tied to concerns over crime, and after September 11, 2001, over threats to national security.

of the border region stretching from California to Texas, and the circular migration of Mexicans and their children, whether voluntary or forced by deportation or removal,<sup>83</sup> has created a border society of mixed-status families.<sup>84</sup> On both sides of the U.S. and Mexico border reside families with ties to U.S. citizenship law, and the ties continue within each new generation.<sup>85</sup>

### C. Immigration History

What happened to the Mexican migrants and their children has been documented in recent accounts chronicling the hardships endured by the

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Chacon, *supra* note 56, at 1838–40; Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 615 (2003). This intense increase in enforcement has driven many thousand Mexicans and their families to Mexico from the 1990s to the present. *Id.* at 1840. Notwithstanding, efforts to fortify the border appear to have limited effect on migration of Mexicans: “[t]he circumstances that drive their migration—lack of job opportunities with decent wages, benefits, and working conditions and lack of adequate social welfare programs” maintain a continued movement north. SPENER, *supra* note 38, at 19. During the Clinton administration, concerted efforts were made by the U.S. and Mexican authorities to seek cooperative approaches on migration. ROSENBLUM, *supra* note 38, at 12. “Presidents George W. Bush and Vicente Fox, both bilingual border-state governors with business backgrounds” succeeded on building the framework for an agreement that would have included legalization of unauthorized migrants, a temporary worker program and border enforcement. *Id.* However, these cooperative efforts were undermined by the attacks on September 11, 2001. *Id.*

83. The patterns of migration and of mass deportations of today remind some of events during the Great Depression. Dianne Solis, *Experts Compare Current Immigration Situation to Deportation of Mexicans in 1930s*, DALLAS MORNING NEWS, Oct. 12, 2008, 2008 WLNR 19671568; see also KOHLI ET AL., *supra* note 3, at 2 (reviewing records under Secure Community program indicates 39 percent of individuals identified for removal have U.S. citizen children).

84. See Jennifer Chacon, *Citizenship and Family: Revising Dred Scott*, 27 WASH. U. J. L. & POL’Y 45, 64 (2008) (“[M]illions of people in the United States live in mixed-status families, in which one [or] more members of the family are undocumented noncitizens.”); Victor Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489, 504 (2003) (identifying that reports show that one in ten families with children in the United States have mixed immigration status).

85. “[I]ncreasing numbers of children are born while parents reside in a state other than their own. The world’s mix of *jus sanguinis* and *jus soli* rules quite often results in children having multiple nationality at birth.” David Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L. J. 1, 5 (1999) (internal citations omitted). The migration of Mexicans between Mexico and the United States and the citizenship laws of both countries have led to multiple generations of dual citizens, children born in the United States of Mexican parents, and the children born in Mexico of U.S. parents. See Spiro, *supra* note 15, at 1418–19 (discussing the role of birthright citizenship as it pertains to dual nationality).

families after the repatriations.<sup>86</sup> There is little known about the immigration history of the families who were subject to the repatriations during the Depression.<sup>87</sup> How many of the U.S. citizen children remained in Mexico, the number who returned to the United States, and when they returned to the United States has not been established.<sup>88</sup> However, in cases where a U.S. citizen sought to prove birth in the United States to assist their children in proving acquired citizenship, we learn that U.S. citizens eventually returned to the United States where they could work to support their families.<sup>89</sup> Some adopted the circular migration patterns of their parents, traveling to the United States for work, and to Mexico to visit family members.<sup>90</sup> Many of the children born in the United States to Mexican migrants and forced to accompany their deported parents maintained strong ties to Mexico which led many to form families there.<sup>91</sup> It is this next generation of children born in Mexico to the U.S.-born children

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86. The repatriations affected the entire family, for the deportation of an undocumented parent “results in the constructive deportation of citizen children” and presents challenges for the whole family. Chacon, *supra* note 84, at 65; *see also* BALDERRAMA & RODRIGUEZ, *supra* note 50, at 267–71 (recounting the stories of families who were forced to leave the United States during the 1930s); ROSENBLUM, *supra* note 38, at 2 (“[M]igration enforcement disrupt emigrant employment, eliminating potential remittance flows, and deportations often return migrants into the same saturated labor markets that contributed to illegal outflows in the first place.”).

87. The repatriation of Mexicans has been at best “a footnote in most immigration histories” and otherwise ignored in scholarship. Johnson, *supra* note 14, at 4.

88. BALDERRAMA & RODRIGUEZ, *supra* note 50, at 265.

89. Ignacio Pina recalled when he and his family were forced to move to Mexico and stated that he and his siblings, all U.S. citizens, were not allowed to take their birth certificates with them. Wendy Koch, *U.S. urged to apologize for 1930s deportation*, USA TODAY, Apr. 5, 2006, available at [http://www.usatoday.com/news/nation/2006-04-04-1930s-deportees-cover\\_x.htm](http://www.usatoday.com/news/nation/2006-04-04-1930s-deportees-cover_x.htm). Mr. Pina endured sixteen years in Mexico until he was able to obtain his birth certificate and return to the United States. *Id.*

90. Abraham Hoffman reports that many of the U.S.-born children could not find employment in Mexico and as soon as they were old enough they returned to the United States. HOFFMAN, *supra* note 71, at 148–50. The migration and employment patterns and the location of family of the U.S. children were like many transnational migrants based on a number of factors, including the “complex connections to two different and at times contradictory cultural, social, and geopolitical sites.” GORDILLO, *supra* note 78, at 126.

91. Stevens, *supra* note 8, at 641. Professors Valencia-Weber and Sedillo Lopez aptly refer to those who live at or near the Mexico–U.S. border as “cross border people.” Valencia-Weber & Lopez, *supra* note 65, at 288–89. Many residents from the border region of the United States and Mexico are often dual citizens of Mexico and the United States. *See supra* note 15. The loyalties of U.S. citizens of Mexican descent to the “old country” are common. Martin, *supra* note 85, at 9. “[P]angs of regret or wonder, emotional ties to the old country, and especially continuing relations with family still residing there make it impossible to accomplish a full and complete break.” *Id.*

of Mexican migrants repatriated during the Great Depression who lay claim to acquired U.S. citizenship.<sup>92</sup>

### 1. Birth and Citizenship

We know that U.S. citizens who resided in Mexico struggled to prove their U.S. citizenship and their children's citizenship as they returned to the United States. They faced a variety of obstacles including lack of documents, conflicting evidence of birth, and denationalization.<sup>93</sup>

Consider the case of J.Z.<sup>94</sup> He was born in 1928 in a barn near Big Spring, Texas, where his Mexican-citizen parents were working in cotton fields, and J.Z. later sought to establish the acquired citizenship of his four children. He did not obtain a Texas birth certificate until 1986. His father, however, had registered him in Mexico in 1939 and that hand written registration recorded J.Z. as having been born in "Viges Prin, Texas," a misspelled, albeit phonetic version of "Big Spring, Texas." The children of Mexican migrants residing in the United States were often born at home and attended by a mid-wife or family members rather than a physician. The birth may not have been immediately registered with the local authorities and evidence of the birth may consist of incomplete, or in some cases, conflicting records.<sup>95</sup> Some parents registered their U.S.-citizen child's birth in Mexico, but unlike J.Z.'s registration, the record states that the birth occurred in Mexico. The motivations for registering a U.S.-citizen child as having been born in Mexico are varied. This practice may

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92. Accounts that illustrate the U.S.-citizen parent's background and efforts to establish citizenship for their children are found in *In re Navarrette* and *In re Yanez-Carrillo*. *In re Navarrette*, 12 I&N Dec. 138 (B.I.A. 1967); *In re Yanez-Carrillo*, 10 I&N Dec. 366 (B.I.A. 1963). In *Alvarez-Garcia v. Ashcroft*, the petitioner's father was born in the United States in 1920. *Alvarez-Garcia v. Ashcroft*, 293 F.3d 1155, 1156 (9th Cir. 2002).

In 1943, Petitioner's father obtained employment on a farm in Texas. Petitioner's father worked on the same farm in the United States from 1943 [to] 1952, generally living [nine] months . . . each of these years in Texas and spending the remaining [three] months with his family in Mexico. The only exception occurred in 1947, when he spent more time in Mexico than in Texas during to a bad crop season. His wife lived with his parents in Mexico until approximately 1948 or 1949 . . . .  
*Id.* at 1156.

93. BALDERRAMA & RODRIGUEZ, *supra* note 50, at 274–75.

94. This case was handled by the St. Mary's Immigration & Human Rights Clinic and is on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

95. Home birth is common and yet causes problems for populations "outside the urban style of childbirthing and government documentation." See Gloria Valencia Weber & Antonia Sedillo Lopez, *supra* note 65, 296–97 (addressing the challenges of the Tohono O'odham tribes that reside in Mexico and the U.S. and the customs of home birth); Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, 31 HUM. RTS. Q. 410, 412 (2009) (reporting that the forty percent of births worldwide are unregistered births, resulting in millions of children without a legal identity).

be explained as an effort to obtain some form of identification for the U.S.-born child or to facilitate enrolling the child in a Mexican school.<sup>96</sup> Nevertheless, it presents a serious impediment to proving U.S. citizenship.

The children of Mexican migrants who were born at home frequently have birth certificates signed by midwives.<sup>97</sup> The State of Texas, for instance, issues birth certificates based on attestations of mid-wives and other witnesses other than hospital staff and physicians.<sup>98</sup> U.S.-born children whose birth was never recorded may carry delayed certificates of birth obtained sometimes many years after their birth when they returned to the United States as adults. Texas also provides for registration of births at any time after the event.<sup>99</sup> The issuance of a delayed certificate is based on a broad range of evidence supporting the Texas birth including baptismal certificates, school records, and affidavits from family members.<sup>100</sup>

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96. See LISA S. BRODYAGA, *MIDWIFE BIRTHS, DELAYED BIRTH CERTIFICATES, AND FEDERAL COURT REMEDIES FOR REFUSAL TO RECOGNIZE ONE'S UNITED STATES CITIZENSHIP* (2011) (providing a discussion about the varying motivations for registering a child's birth in Mexico, even though the birth technically occurred in the United States). In a series of emails with Lisa S. Brodyaga, she states that the practice of dual registration has subsided since the Mexican government introduced procedures for recognizing a U.S.-child's Mexican citizenship. Email from Lisa S. Brodyaga, Att'y, to Lee Terán, Clinical Professor of Law, St. Mary's Univ. Sch. of Law (Sept. 11, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

97. See Miriam Jordan, *They Say They Were Born in the USA. The State Department Says Prove It*, WALL ST. J., Aug. 11, 2008, <http://online.wsj.com/article/SB121842058533028907.html> (stating that midwives were forging birth certificates for children born in Mexico, which has caused the U.S. government to require additional proof for citizenship purposes).

98. The Texas statutes require each child in the state to be registered. TEX. HEALTH & SAFETY CODE ANN. § 192.001 (West 2010). Birth certificates should be filed with the local registrar in the district where the birth occurred by a physician, midwife or "person acting as a midwife in attendance at a birth." *Id.* at § 192.003(a). The statute also provides for obtaining a birth certificate in the absence of a record by the previously mentioned people and when the birth is not in a hospital or birthing center. *Id.* at § 192.003(c). In such cases, a birth certificate may be obtained from the local registrar at the request of the child's parent or the owner/householder of the place where the birth occurred. *Id.* Blank birth certificate forms may even be handed out to midwives, people acting as midwives, and other individuals in reasonable amounts, although these blank forms are closely guarded. TEX. ADMIN. CODE ANN. § 181.26 (i) (West 2010). Additionally, the specific proof required to register a non-institutional birth certificate includes "(1) proof of pregnancy; (2) proof that there was an infant born alive; (3) proof that the birth occurred in the registration district; and (4) proof that the infant's birth occurred on the date stated." *Id.* § 181.26(c).

99. TEX. HEALTH & SAFETY CODE ANN. § 192.021 et. seq.

100. See *Delayed Certificate of Birth Registration*, TEX. DEP'T OF STATE HEALTH SERV., <http://www.dshs.state.tx.us/vs/delayed/default.shtm> (last updated Jan. 2, 2012) (list-

It is evident that some of the U.S.-born children of Mexican migrants cannot prove their U.S. citizenship. They lack evidence that they were born in the United States or the documents they have conflict with other evidence; most notably Mexican birth records, which U.S. federal authorities argue establishes birth in Mexico and not the United States.<sup>101</sup> Furthermore, some actions taken by U.S. citizens while residing in Mexico can result in their loss of citizenship. U.S. law has established denationalization for such acts as desertion from the military,<sup>102</sup> draft evasion,<sup>103</sup> and voting in foreign elections.<sup>104</sup> In *Perez v. Brownell*,<sup>105</sup> the Supreme Court ruled that a man born in Texas to Mexican parents who moved to Mexico shortly after his birth lost his citizenship when he voted in a Mexican election.<sup>106</sup> While these provisions were subsequently held unconsti-

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ing suggested types of supporting documentation for obtaining delayed birth certificates which includes: the birth certificate(s) of any adult children, school enrollment record or transcript, a military discharge record (DD214), marriage or divorce records, a Social Security application, an original baptismal certificate, a selective service record, any hospital records, an application for a driver's license, an application for a state-issued identification card, and/or an affidavit of birth facts signed by either a parent, grandparent, or older sibling). Each document submitted needs to be at least five years old and be an original or certified copy. TEX. HEALTH & SAFETY CODE ANN. § 192.024.

101. See *Lopez v. Holder*, 563 F.3d 107, 108 (5th Cir. 2009) (concerning a case where a mother had registered her children's births in Mexico, but later claimed they were actually born in the United States); *De Brown v. Dep't of Justice*, 18 F.3d 774, 775 (9th Cir. 1994) (illustrating that an uncertified California birth certificate and witness testimony was contradicted by a certified Mexican birth record); BRODYAGA, *supra* note 96, at 3 (regarding the practice of registering a child's birth in both the United States and Mexico). See also *In re Cantu*, 17 I&N Dec. 190, 191 (B.I.A. 1978) (ruling in favor of a claimant who was born in an area known as the "Horcan Tract" on the border between Texas and Mexico). The "Horcan Tract" parcel was created in 1906 when a private company unlawfully changed the course of the Rio Grande River and Mexico assumed control of the land. *Id.* In 1972 the United States ceded this tract to Mexico in a treaty, but the Board ruled that the respondent who was born on the Horcan Tract in 1935 was, in fact, a U.S. citizen. *Id.* at 191, 198; see also MCWILLIAMS, *supra* note 43, at 60–61 (stating that "[w]hile the border was at least visible along the Rio Grande, it was by no means permanent. For the river has constantly changed its channel; islands formerly in Mexico have passed over to the American side; and new islands have been formed").

102. Nationality Act of 1940, Pub. L. No. 76-853, ch. 876, § 401(g), 54 Stat. 1137, 1169.

103. Immigration and Nationality Act of 1952 (INA), ch. 3, § 349(a)(10), 66 Stat. 163, 268.

104. Nationality Act of 1940, ch. 876, § 401(e).

105. 356 U.S. 44 (1958).

106. *Perez v. Brownell*, 356 U.S. 44, 62 (1958). In a sharply divided opinion, the Court upheld the authority of Congress, under its power to deal with foreign affairs, to strip U.S. citizens of their status when engaging in political activities in other countries. *Id.*



tutional,<sup>107</sup> an undetermined number of U.S. citizens and their children born abroad were affected.<sup>108</sup>

## 2. Accounts of Presence or Residence

What is also known from the U.S.-citizen children raised in Mexico after their parents were deported is that the children received little education or professional training in Mexico or the United States.<sup>109</sup> Thus, many U.S.-citizen children of Mexican migrants followed in their parents' footsteps once they reached adulthood and returned to the United States to work in unskilled labor common to migrants—farm and ranch labor, domestic work, construction projects, and hotel and restaurant work.

In the case of B.V. who applied to assert his acquired citizenship, his U.S.-citizen father began working in the United States when he was a teenager, and he worked continuously in the United States until his death at age of fifty-six. In the case of S.R. who also claimed acquired citizenship, his U.S.-citizen father worked throughout the United States in farm and ranch labor from the age of seventeen until he retired. However, the social security earnings records for both fathers did not fully reflect their earnings from farm and ranch employers who did not deduct social security payments. Consequently, their earnings reports for key years before their sons' births show little or no income making it difficult to establish the presence required to transmit citizenship.

U.S.-citizen women who were present in the United States often have less documentation than male U.S. citizens. P.H. and C.J. sought to assert acquired U.S. citizenship through their U.S.-citizen mothers who had not attended school in the United States and worked only in housekeeping and farm labor that provided no earnings record.

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107. *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163 (1963).

108. Children born abroad after the expatriation of a U.S. parent do not acquire U.S. citizenship. *In re M.*, 6 I&N Dec. 70, 72 (B.I.A. 1953). However, if the parent's loss of citizenship preceded *Afroyim*, it can be argued the parent was a U.S. citizen at the time the children were born abroad. LEVY, *supra* note 16, at § 4:10. These cases continue to surface. See Email from Barbara Hines, Clinical Professor of Law, Univ. of Tex. Sch. of Law, to Lee Terán, Clinical Professor of Law, St. Mary's Univ. Sch. of Law (Aug. 29, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (regarding her case of a child born in Mexico to a U.S.-citizen father subsequent to the father's order of expatriation which was based on draft evasion).

109. See BALDERRAMA & RODRIGUEZ, *supra* note 50, at 21–22 (identifying that U.S. born children were deprived of an education in Mexico and the United States); LEYVA, *supra* note 60, at 14–19 (stating that Mexican-American children in the United States suffered under school segregation policies and Mexico lacked the resources to provide public education to all children).

The U.S. citizens report that they worked hard and steadily in the United States to support growing families left behind in Mexico, and their family members, employers, and other migrant co-workers provide details of long ago regarding the U.S. citizen's presence in the United States. But, the continuity of their presence in the United States was frequently interrupted by trips to Mexico to visit family and due to the nature of their employment the documentation of their presence is scattered and incomplete.

### III. SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR ACQUIRED CITIZENSHIP

#### A. *Constitutional and Statutory Basis for U.S. Citizenship*

Citizenship is defined as the full membership in a given state, which guarantees all the rights, entitlements, and protections offered by the state.<sup>110</sup> The benefits of U.S. citizenship—stability, mobility, political rights, employment, education, and importantly, a defense from deportation—are fundamental, viewed as “one of the most valuable rights in the world today.”<sup>111</sup>

The United States provides two means of obtaining citizenship—by statute and under the Constitution<sup>112</sup>—but in spite of the importance given to citizenship, it is surprising that the U.S. Constitution, when adopted, did not define citizenship and made only oblique references to the term.<sup>113</sup> The Naturalization Clause in Article I, Section 8, Clause 4 gives Congress authority to set terms for obtaining citizenship by statute.<sup>114</sup> A complete framework for U.S. citizenship was not established in the Constitution until after the Civil War when the Fourteenth Amendment, enacted in response to the pre-Civil War case, *Dred Scott v. Sandford*,<sup>115</sup> established that “all persons born or naturalized in the United

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110. IMMIGRATION AND CITIZENSHIP, *supra* note 4, at 2.

111. *Kennedy*, 372 U.S. at 160; *see Perez*, 356 U.S. at 64 (Warren, C.J., dissenting) (stating “[c]itizenship is man’s basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person . . .”).

112. *Rogers v. Bellei*, 401 U.S. 815, 828–29 (1971); LEVY, *supra* note 16, at § 2:1; Ann K. Wooster, *Validity, Construction, and Application of 8 U.S.C.A. § 1401(c)-(g), Providing for American Citizenship in Certain Circumstances of Child Born Outside United States, or Found Within United States and of Unknown Parentage, and Predecessor Statutes*, 175 A.L.R. FED. 67, \*2a (2002).

113. IMMIGRATION AND CITIZENSHIP, *supra* note 4, at 9.

114. U.S. CONST. art. I, § 8, cl. 4; *see Rogers*, 401 U.S. at 828–29. The U.S. Constitution stipulates that the President of the United States be a “natural born Citizen,” and guarantees that “[c]itizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. 2, § 1, cl. 5, art. IV, § 2, cl. 1.

115. 60 U.S. 393 (1856) (holding that African-American slaves are not citizens of the United States).

States and subject to the jurisdiction thereof” were citizens of the United States.<sup>116</sup>

Congress has developed a complex set of rules and procedures for asserting and maintaining U.S. citizenship by birth, adopting the two principles of *jus solis* and *jus sanguinis*,<sup>117</sup> and U.S. citizenship by naturalization.<sup>118</sup> This Article focuses on individuals who claim citizenship by birth under *jus sanguinis* and the barriers they face in asserting their claims.<sup>119</sup> The statutes enacted by Congress for transmission of citizenship from a U.S. citizen parent to a child are particularly elaborate and require a comprehensive knowledge of all forms of U.S. citizenship law. First, transmission occurs only if the parent is a U.S. citizen so the rules for obtaining U.S. citizenship by birth or naturalization apply.<sup>120</sup> Second, Congress has enacted many statutes providing for the terms for acquisition of citizenship, and some provisions are determined to be retroactive and others are not.<sup>121</sup> At one time, children born outside the United States could only acquire U.S. citizenship at birth from a U.S.-citizen father;<sup>122</sup> and in 1940, Congress amended the statute to permit the

116. *Rogers*, 401 U.S. at 827.

117. Motomura, *supra* note 36, at 107–08.

118. *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis> (select “Citizenship Through Naturalization”) (last updated June 3, 2011) (explaining the process of naturalization and how to apply).

119. There is a similar set of rules governing derivative citizenship that also benefit the children of U.S. citizens, but these provisions transmit citizenship *after* birth and are more appropriately tied to citizenship by naturalization, rather than by birth. INA §§ 320, 322, 8 U.S.C. §§ 1431, 1433 (2006). Congress amended the derivative citizenship statutes in the Child Citizenship Act of 2000 in what is considered the “most radical amendment to derivative citizenship since the provision was introduced in 1790.” Daniel Levy, *The Child Citizenship Act of 2000*, 6 BENDER’S IMMIGR. BULL. 293 (2001). A child, including those adopted, automatically derives citizenship when (1) at least one parent is a citizen of the United States, (2) the child is under the age of 18, and (3) the child is a legal resident and in the custody of the U.S. citizen parent. INA § 320, 8 U.S.C. § 1431. The benefits of derivative citizenship also apply to a child residing outside the United States. INA § 322, 8 U.S.C. § 1433. In this Article I focus my discussion and examples on citizenship acquired at birth. Notwithstanding, derivative citizenship is an important form of citizenship and a significant benefit to children. Increasingly, when the government ignores evidence of citizenship, derivative citizens also find themselves caught in removal proceedings. *See, e.g.*, Millie Lapidario, *Pro Bono Attorneys Fight for Client Trapped in Immigration Black Hole*, THE RECORDER, July 19, 2007, <http://www.law.com/jsp/article.jsp?id=1184749597071> (describing removal case of Yuttasak Simma, a claimant of derivative citizenship from his naturalized mother); *infra* Part V.C.

120. INA § 320, 8 U.S.C. § 1431 (stating definitively that one parent must be a U.S. citizen, whether by birth or by naturalization).

121. LEVY, *supra* note 16, at § 4:18. There have been four different statutes enacted between 1790 and 1934 that governed the acquisition of citizenship to persons born abroad. *Id.*

122. *Id.*

out of wedlock children of U.S. citizen mothers to acquire citizenship.<sup>123</sup> There are different statutory requirements for transmitting citizenship to children born to two U.S. citizens,<sup>124</sup> children born to one U. S.-citizen parent and one non-citizen parent,<sup>125</sup> and children born out of wedlock,<sup>126</sup> and requirements that the U.S. parent has established some ties to the United States before the birth of the child. For some time, the law also imposed retention requirements on children born abroad to a U.S.-citizen parent and a non-citizen parent, and the child was required to reside in the United States for a specified time in order to maintain or retain citizenship.<sup>127</sup>

The cases concerning transmitted citizenship are legally challenging and involve complicated factual determinations with evidentiary problems, as are illustrated in the examples cited in Part III below. Questions concerning the power of Congress over U.S. citizenship, a long debate by an often divided Supreme Court, add to the complexity of identifying and presenting these cases.<sup>128</sup> The issues raised in the various court decisions concern the extent to which Congress can dominate in setting the terms and conditions by which citizenship is acquired, but more importantly here, the authority over the procedures for asserting and reviewing decisions relating to citizenship.

#### 1. Statutory Provisions for Acquisition of Citizenship at Birth

In 1790, the first U.S. Congress passed a statute that transmitted citizenship to a child born abroad to a U.S.-citizen father, but not a U.S.-citizen mother, who had resided in the United States before the child's birth.<sup>129</sup> The gender restriction was eliminated in 1934 to allow children

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123. *Id.* § 4:20. In 1994, Congress enacted a statute which provides citizenship retroactively to the children who were born abroad prior to 1934 to U.S. citizen mothers. *Id.* § 4:18.

124. INA § 301(c), 8 U.S.C. § 1401(c) (2006).

125. INA § 301(g), 8 U.S.C. § 1401(g).

126. INA § 309, 8 U.S.C. § 1409; Tuan Anh Nguyen v. INS, 533 U.S. 53, 58–59 (2001).

127. LEVY, *supra* note 16, at § 4:13. Congress gradually relaxed the conditions subsequent for acquisition of citizenship, and in 1978 repealed all retention requirements. *See infra* notes 147–150.

128. *See* Rogers v. Bellei, 401 U.S. 815, 826–27 (1971) (Black, J., dissenting) (Court divided on whether Congress can “enact a law stripping an American of his citizenship”); Afroyim v. Rusk, 387 U.S. 253, 268–69 (1967) (disagreed as to whether a person loses citizenship if he or she has voted in a foreign political election); Perez v. Brownell, 356 U.S. 44, 62–63 (1958) (split on the issue of loss of citizenship and the power of Congress to set terms by which a citizen's status is relinquished); *see also* IMMIGRATION AND CITIZENSHIP, *supra* note 4, at 270 (showing a divided Supreme Court as to whether a person can be voluntarily deprived of citizenship).

129. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1795). The statute defined the terms for naturalization of some aliens and further provided that “the children of citizens

born abroad to U.S.-citizen mothers to also acquire U.S. citizenship at birth.<sup>130</sup> The 1994 Immigration and Nationality Technical Corrections Act (INTCA) retroactively granted citizenship to the children born abroad prior to 1934 to U.S.-citizen mothers.<sup>131</sup>

Each statute enacted since 1790 requires that the child be the natural child of the U.S. parent<sup>132</sup> and that the parent have some connection to the United States prior to the birth of the child.<sup>133</sup> A child born abroad to two U.S. parents acquires citizenship when at least one parent resided in the U.S. prior to the birth of the child.<sup>134</sup> There is no minimum period for which one of the U.S. parents must have been present.<sup>135</sup>

Until 1940, the child born abroad to one U.S. parent and one non-citizen parent also acquired citizenship as long as the U.S. parent had resided in the United States.<sup>136</sup> The Act of 1940 dramatically changed the requirements for acquisition of citizenship,<sup>137</sup> and the new law established a more stringent requirement for residence in the United States for

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of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *[p]rovided*, [t]hat the right of citizenship shall not descend to [a] person whose fathers have never been resident in the United States. . . .” *Id.*; LEVY, *supra* note 16, at § 4:1.

130. Act of May 24, 1934, Pub. L. No. 73-250, § 1993, 48 Stat. 797.

131. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4305 (codified at INA § 301(h), 8 U.S.C. § 1401(h) (2006)).

132. The State Department emphasizes the importance of actual blood ties, for “being born in wedlock is not sufficient to establish U.S. citizenship through a U.S. citizen father.” LEVY, *supra* note 16, at § 4:4.

133. Congress set terms for transmission, including rules for presence or residence of the U.S. parent, so that the child would likely have some tie to the United States. *Weedin v. Chin Bow*, 274 U.S. 657, 666–67 (1927).

134. Act of May 24, 1934, § 1993. The statute as written stated that:

Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child.

*Id.*

135. *Id.* Any form of physical presence, other than a brief presence while in transit to another country, meets the definition of “residence.” LEVY, *supra* note 16, at § 4:29. The Immigration Act of 1940 defined the term “residence” as “the place of general abode.” Nationality Act of 1940, Pub. L. No. 76-853, ch. 876, § 10454 Stat. 1137, 1169. The statute now provides that “the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.” INA § 101(a)(33), 8 U.S.C. § 1101(a)(33) (2006); *accord Interpretation § 301.1 United States Citizenship*, USCIS.GOV, <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-45104/0-0-0-45113.html> (last visited Feb. 18, 2012).

136. LEVY, *supra* note 16, at § 4:29.

137. Nationality Act of 1940, § 201(g).

the transmitting parent.<sup>138</sup> He or she had to have resided in the United States for at least ten years prior to the birth of the child of which five of those years were after the parent attained sixteen years of age.<sup>139</sup> The Immigration and Nationality Act of 1952 liberalized the prior parental connection in cases of children of mixed-citizenship parents to ten years physical presence, five of which were after the parent reached the age of fourteen.<sup>140</sup>

The current statute, effective November 14, 1986, provides that a child born abroad acquires U.S. citizenship at birth if one parent is a U.S. citizen and the other is a non-citizen and the citizen parent was, prior to the birth of the child, physically present in the United States for five years, two of which were after the age of fourteen.<sup>141</sup>

The statute also provides for acquisition of citizenship to children who are born out of wedlock.<sup>142</sup> The child born to an unmarried U.S.-citizen mother acquires citizenship if the mother was physically present in the United States for at least one continuous year.<sup>143</sup> The acquisition of citizenship to a child born out of wedlock to a U.S.-citizen father is governed by a different set of standards.<sup>144</sup> The child who is born out of wedlock to a U.S.-citizen father must establish that there is a blood relationship between the father and child, and that prior to the child's eighteenth birthday, the father agreed in writing to support the child, and the child's legitimacy or paternity was established.<sup>145</sup> However, even when the father meets the paternity requirements in INA Section 309, he still must establish the prior presence requirements set in INA Section 301(g).<sup>146</sup>

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138. *Id.*

139. *Id.*

140. Compare *Id.*, with Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 301(a)(7), 66 Stat. 163.

141. INA § 301(g), 8 U.S.C. § 1401(g) (2000).

142. INA § 309, 8 U.S.C. § 1409.

143. INA § 309(c), 8 U.S.C. § 1409(c); see *supra* note 19.

144. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 53 (2001) (upholding the requirements for transmission of citizenship to children born out of wedlock to U.S. fathers as not violating the equal protection clause).

145. INA § 309(a), 8 U.S.C. § 1409(a) (1994); see *supra* note 19. The Supreme Court ruled that the standards for legitimization required by the U.S. father are non-discriminatory. *Tuan Anh Nguyen*, 533 U.S. at 73; M. Isabel Medina, *Real Differences and Stereotypes—Two Visions of Gender, Citizenship, and International Law*, 7 N.Y. CITY L. REV. 315, 337 (2004).

146. INA § 309, 8 U.S.C. § 1409; INA § 301(g), 8 U.S.C. § 1401(g); *United States v. Flores-Villar*, 536 F.3d 990, 997 (9th Cir. 2008), *aff'd*, 564 U.S. \_\_\_, 131 S. Ct. 2312 (2011) (*per curiam*).

In the Act of May 24, 1934, Congress imposed a retention requirement on the children born to one U.S. parent and one non-citizen parent.<sup>147</sup> The law set a condition subsequent for acquisition of citizenship in that the child was required to reside continuously in the United States for five years and take an oath of allegiance to the United States.<sup>148</sup> In successive statutes the requirements were liberalized.<sup>149</sup> Then in 1978, Congress repealed the retention requirements and in 1994, Congress enacted a law that restored citizenship to those individuals who lost status after failing to meet prior retention requirements.<sup>150</sup>

## 2. Constitutional Foundation

Acquired citizenship is by nature statutory and based upon congressional power to establish a “uniform Rule of Naturalization.”<sup>151</sup> Congress sets conditions, both precedent and subsequent, for the transmission of citizenship from the parent to the child born outside the United States. Because Congress exercises control over this area of law, federal courts have limited authority to determine the acquisition of citizenship “on a basis other than that prescribed by Congress.”<sup>152</sup> The plenary power doctrine, a tradition which began in the *Chinese Exclusion Case*,<sup>153</sup> established congressional domination in the area of the admission and deportation of non-citizens.<sup>154</sup> However, the Court has also extended the

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147. Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797. The Act of March 2, 1907 (Pub. L. No. 59-194, § 6, 34 Stat. 1229) imposed a requirement that at age eighteen the child “record at the American consulate their intention to become residents and remain citizens of the United States . . . .” *Rogers v. Bellei*, 401 U.S. 815, 824 (1971). However, non-compliance resulted in loss of diplomatic protection and not a loss of citizenship. *Id.*

148. *Rogers*, 401 U.S. at 816.

149. Statutes enacted in 1940, 1952, and 1972 gradually eased the retention requirements. LEVY, *supra* note 16, at § 4:3.

150. INA § 324, 8 U.S.C. § 1435 (2006). Immigration and Naturalization Technical Corrections of 1994, Pub. L. 103-416, § 103(a), 108 Stat. 4305; *Alexander v. INS*, 74 F.3d 367, 370 (1st Cir. 1996); LEVY, *supra* note 16, at § 4:3.

151. U.S. CONST. art. I, § 8, cl. 4.

152. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73(2001).

153. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government; the interests of the country require it, cannot be granted away or restrained on behalf of any one.

*Id.*

154. *Chae Chan Ping*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 653–54 (1892) and *Fong Yue Ting v. United States*, 149 U.S. 698, 729–31 (1893), represent a “trio of cases infected by more than a little racism” that laid the foundation for the plenary power doctrine. Daniel Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1899 (2000); accord

plenary power doctrine to limit application of Constitutional guarantees to questions of statutory citizenship.<sup>155</sup> In *Weedin v. Chin Bow*,<sup>156</sup> the Supreme Court ruled that the ability of a child who is born abroad to claim acquired citizenship is determined solely by reference to the federal statute.<sup>157</sup>

In contrast, Congress lacks the same power to regulate terms and conditions for citizenship as defined under the Fourteenth Amendment.<sup>158</sup> The distinction between constitutional and statutory forms of citizenship was the subject of the 1971 Supreme Court case *Rogers v. Bellei*.<sup>159</sup> There, the Court decided the scope of constitutional protections afforded to individuals with a claim to acquisition of U.S. citizenship by descent. In *Bellei*, the Court determined whether the drafters of the Fourteenth Amendment intended to include individuals who acquire citizenship through a parent within the parameters of the Fourteenth Amendment.<sup>160</sup> The Court also addressed the extent that the Fifth Amendment Due Process Clause limited congressional powers to establish conditions subsequent to the birth of the child, in particular the retention requirements.<sup>161</sup>

The statute in effect at the time of Mr. Bellei's birth provided that a child born abroad to one U.S. citizen and one non-citizen parent lost citizenship unless the child accumulated five years of physical presence in the United States between the ages of fourteen and twenty-eight.<sup>162</sup> Mr. Bellei failed to meet the requirement, and argued that a child who acquired citizenship through one parent is—like a child born in the United States—a U.S. citizen at birth, and enjoys the protections of the Fourteenth Amendment.<sup>163</sup> Thus, Bellei maintained that he could not be

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Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–11 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580, 595–96 (1952); *Yamataya v. Fisher*, 189 U.S. 86, 97–98 (1903).

155. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (holding that Congress retains “broad power over immigration and naturalization”); *United States v. Ginsberg*, 243 U.S. 472, 474 (1917) (stating “[c]ourts are without authority to sanction changes or modifications” of legislative actions in the area of naturalization); see also Derek Ludwin, *Can Courts Confer Citizenship? Plenary Power and Equal Protection*, 74 N.Y.U. L. REV. 1376, 1382 (1999) (illustrating Congress’s “plenary power over the naturalization process”).

156. 274 U.S. 657 (1927).

157. *Weedin v. Chin Bow*, 274 U.S. 657, 659 (1927).

158. *United States v. Wong Kim Ark*, 169 U.S. 649, 653–55 (1898).

159. 401 U.S. 815 (1971).

160. *Rogers v. Bellei*, 401 U.S. 815, 816 (1971).

161. *Id.*

162. *Id.* at 816 n.1.

163. *Id.* at 820.



stripped of his already acquired citizenship by failing to meet the condition subsequent retention requirements.<sup>164</sup>

The Court ruled that Mr. Bellei's failure to comply with the statute was not an unconstitutional loss of citizenship since Congress properly exercised its authority to impose a condition subsequent to acquisition of citizenship and retained the power to deny citizenship once bestowed.<sup>165</sup> The Court distinguished between the native born and naturalized citizens, and the child born abroad to a U.S.-citizen parent.<sup>166</sup> The Fourteenth Amendment describes persons "born or naturalized in the United States."<sup>167</sup> The Court found that Mr. Bellei's birth abroad did not entitle him to protection from the Fourteenth Amendment and his claim "thus must center in the statutory power of Congress and in the appropriate exercise of that power."<sup>168</sup> The Court then addressed application of Fifth Amendment. Applying a standard as to whether the retention requirements were "unreasonable, arbitrary, or unlawful," the Court ruled that Congress did not exceed its authority as a matter of due process. The retention requirements were considered reasonable in that they promoted attachment of the child to the United States.<sup>169</sup>

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164. *Id.* at 826–27.

165. *Rogers*, 401 U.S. at 827.

166. *Id.* at 830.

167. U.S. CONST. amend. XIV, § 1.

168. *Rogers*, 401 U.S. at 828 (1971); accord *Medina*, *supra* note 145, at 330–31.

169. *Rogers*, 401 U.S. at 831–32. Congress, the Court said, "has an appropriate concern with problems attendant on dual nationality." *Id.* at 831. The *Bellei* case was decided in the midst of a series of cases in which the Supreme Court struggled with the extent of congressional power over questions of loss of citizenship. *Spiro*, *supra* note 15, at 1415. Congress' hostility to dual nationality led to legislation that established grounds for loss of citizenship. *Id.* In *Perez v. Brownell*, the Court upheld a statute providing for the loss of citizenship to a U.S. citizen who voted in a foreign election. *Perez v. Brownell*, 356 U.S. 44, 62 (1958). Then, in *Trop v. Dulles*, the Court ruled against a statute that denationalized citizens who deserted the armed forces during a time of war. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Finally, in *Afroyim v. Rusk*, the Court overruled the *Perez* decision and found that a citizen who voted in a foreign election did not lose citizenship "unless he voluntarily relinquishes it." *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967). In the dissenting opinion in *Rogers*, Justice Black considered the majority decision to have overruled *Afroyim*, but in *Vance v. Terrazas*, the Court reaffirmed *Afroyim* and held that "expatriation depends upon the will of the citizen rather than on the will of Congress and its assessment of his conduct." T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1471 (1986) (citing *Vance v. Terrazas*, 444 U.S. 252, 260 (1980)). While the Court often used the term "expatriation" in these cases, the proper term for statutory loss of citizenship is "denationalization." See Gary Endelman, *Renunciation of U.S. Citizenship: An Update*, IMMIGRATION BRIEFINGS, July, 1996, at 4. Expatriation is a voluntary renunciation of citizenship. *Id.*

Concerns with dual nationality persist. In a 2011 revision to personnel regulations, the U.S. Army announced that dual citizens were no longer eligible to enlist into jobs that required security clearances unless they already held such clearances. Margaret Stock,

In his dissent Justice Black argued that it was unacceptable that “the Fourteenth Amendment protects the citizenship of some Americans and not others”<sup>170</sup> and rejected the “concept of a hierarchy of citizenship.”<sup>171</sup> To Black, *Bellei* conferred “second-class citizenship, subject to revocation at will of Congress” on individuals who were born abroad and whose citizenship is based on transmission from a U.S. parent.<sup>172</sup>

Following *Bellei*, Congress repealed the retention requirements altogether.<sup>173</sup> The extent to which Congress retains unrestrained power in the citizenship arena is subject to debate. The plenary power doctrine has received broad and sustained criticism,<sup>174</sup> and the Court has at times moderated application of the principle.<sup>175</sup> Most recently, in *Nguyen v.*

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*U.S. Army Bars Dual U.S. Citizens From Most Jobs*, IMMIGR. EDGE (Oct. 26, 2011), available at <http://www.immigrationedge.com/2011/10/26/us-army-bars-dual-us-citizens-from-most-jobs/>. Interestingly, this policy permits other countries to have a say in who can serve within the U.S. Armed forces, because dual-citizenship is determined by the laws of the other country, and not all allow for their citizens to expatriate. *Id.* This rule could potentially bar millions of individuals from serving in the military. *Id.*

170. *Rogers*, 401 U.S. at 839.

171. *Id.*

172. *Id.* Justice Black argued that the Fourteenth Amendment compels protection to a child who acquires citizenship at birth and relied on *United States v. Wong Kim Ark*. *Id.* There the Court held, with regard to a child born in the United States of non-citizen parents, that the Fourteenth Amendment “contemplates two sources of citizenship and two only, birth and naturalization.” *United States v. Wong Kim Ark*, 169 U.S. 649, 649 (1898).

173. The Court in *Rogers v. Bellei* anticipated the liberal trend in Congress regarding acquired citizenship statutes. *Rogers*, 401 U.S. at 826. “[I]t may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child.” *Id.* The trend continued beyond repeal of the retention provisions. In 1986 Congress amended the statute to ease the requirements the parent must meet prior to the child’s birth, from ten years (five of which are after the age of fourteen) to five years (two of which are after the age of fourteen). *Supra* at note 140. Then, in 2000 Congress again amended the statute to reform the parallel derivative citizenship provisions of INA §§ 320, 322. 8 U.S.C. § 1431 (2006); 8 U.S.C. § 1433 (2006). The Child Citizenship Act permits a legal resident child to derive citizenship when one parent is or becomes a U.S. citizen and further provides for derivative citizenship for adopted children. Levy, *supra* note 119, at 293.

174. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 863 (1987). “The power of Congress to control immigration and to regulate alienage and naturalization is plenary.” *Id.* But even plenary power is subject to constitutional restraints. *Id.* Accord Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985); Ludwin, *supra* note 155, at 1382–85; Stanley N. Ingber, Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 796–98 (1971).

175. See T. Alexander Aleinikoff, *Detaining the Plenary Power: the Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L. J. 365, 367–75 (2002) (discussing Mr. Zadvydas and how the court ruled against his indefinite detention, but continued to embrace the plenary power doctrine); Hiroshi Motomuro, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV.

*INS*,<sup>176</sup> a case concerning citizenship for children born abroad and out of wedlock, the Court employed a reasonableness standard and found the statute satisfied legislative interests even though it imposed more onerous conditions for acquisition of citizenship on the U.S.-citizen father than it required of U.S.-citizen mothers.<sup>177</sup> The Court did not rely on a distinct plenary power analysis.<sup>178</sup>

The Supreme Court is more active in affording protection from threats to removal and from congressional restrictions on the judicial review of administrative decisions.<sup>179</sup> In an early case involving an applicant who sought entry to the United States as a citizen, *United States v. Ju Toy*,<sup>180</sup> the Supreme Court ruled that due process did not require judicial review of the executive decision of an immigration inspector who denied entry.<sup>181</sup> Then in *Ng Fung Ho v. White*,<sup>182</sup> the Court considered whether an individual who claims to be a U.S. citizen can be deported solely based on an executive order.<sup>183</sup> The Court guaranteed the right of a U.S. citizen who was facing deportation to a judicial determination of citizenship,<sup>184</sup> and reasoned that the deportation of a U.S. citizen could cost that individual a constitutionally protected right, the possible “loss of both property and life, or of all that makes life worth living.”<sup>185</sup> *Ng Fung Ho* survives as a hallmark for judicial review of deportation/removal when

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1625, 1626–27 (1992) (identifying that courts use procedural due process as a substitute for use of substantive constitutional claims); Hiroshi Motomuro, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (arguing that the Court relies on “phantom constitutional norms” to avoid application of constitutional principles).

176. 533 U.S. 53 (2001).

177. *United States v. Flores-Villar*, 536 F.3d 990, 999 (9th Cir. 2008), *aff’d*, 564 U.S. \_\_\_, 131 S. Ct. 2312 (2011) (per curiam).

178. Upon finding that there was no violation of equal protection, the Court reasoned “we need not assess the implications of statements in our earlier cases regarding the wide deference afforded Congress in the exercise of its immigration and naturalization power.” *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 72–73 (2001). However, in his concurring opinion, Justice Scalia employed the long-standing plenary power language, the “Court lacks power to provide relief of the sort requested in this suit—namely, conferral of citizenship on a basis other than that prescribed by Congress.” *Id.* at 73 (Scalia, J., concurring).

179. See Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L. J. 89, 142 (2010) (arguing that the Supreme Court unequivocally repudiated the plenary power doctrine in *Boumediene v. Bush*).

180. 198 U.S. 253 (1905).

181. *United States v. Ju Toy*, 198 U.S. 253, 263 (1905).

182. 259 U.S. 276 (1922).

183. *Ng Fung Ho v. White*, 259 U.S. 276, 282 (1922).

184. *Id.* at 284–85.

185. *Id.* at 284; see *Alexander v. INS*, 74 F.3d 367, 370 (1st Cir. 1996) (stating that U.S. citizenship is “one of the most precious [rights] imaginable”).

the loss of citizenship is at stake.<sup>186</sup> Furthermore, in an apparent undermining of *Ju Toy*, the Court in *Rusk v. Cort*<sup>187</sup> extended the right of judicial review to an individual who asserted a claim to citizenship at the border.<sup>188</sup> However, Part VI will address the right to due process for some citizen claimants and the extent to which Congress can insulate from judicial review the decisions of low-level immigration officials who reinstate prior orders of deportation and removal against U.S.-citizen claimants.

B. *Standards and Procedures for Asserting Claims to Acquired Citizenship*

Acquired citizenship operates as a matter of law at the time of the U.S.-citizen child's birth and is not a benefit for which the child must apply.<sup>189</sup> However, unlike a person born in the United States who normally has a birth certificate, a U.S. citizen who is born abroad has no documentary proof, and he or she must affirmatively apply for a certificate of citizenship before the Department of Homeland Security (DHS),<sup>190</sup> or alternatively a U.S. passport from the Department of State.<sup>191</sup> The U.S. citizen may also claim citizenship as a defense to deportation or removal proceedings in immigration court, an agency of the Department of Justice.<sup>192</sup> The different channels set up within these agencies provide procedures for asserting a claim to citizenship and rules for obtaining administrative appeals.

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186. *Iasu v. Smith*, 511 F.3d 881, 886 (9th Cir. 2007); *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2004); *Alexander*, 74 F.3d at 370.

187. 369 U.S. 367 (1962).

188. *Rusk v. Cort*, 369 U.S. 367, 375 (1962); see *Hernandez v. Cremer*, 913 F.2d 230, 236 (5th Cir. 1990) (ruling that the Fifth Amendment protects U.S. citizens seeking return to the United States from abroad). In another example of the weakening of the plenary power doctrine, the Court extended due process protections to legal permanent residents seeking to reenter the United States. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

189. See *United States v. Smith-Baltiher*, 424 F.3d 913, 920–21 (9th Cir. 2005) (“Smith was entitled to U.S. citizenship, along with its rights and privileges, from the moment of birth, not upon the issuance of a certificate of citizenship or any other formal determination by the INS or any other governmental official.”).

190. INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2006). Until 1929 the government had no authority to issue a certificate of citizenship. 7 GORDON, *supra* note 8, at § 99.04. The Act of March 2, 1929 provided for issuance of a certificate to children who derived citizenship from a naturalized parent, and in the Nationality Act of 1940, Congress provided for certificates of citizenship to children who acquired citizenship. *Id.*

191. INA §§ 104(a), (c); 22 U.S.C. § 211a (2006).

192. *Ortega v. Holder*, 592 F.3d 738, 744 (7th Cir. 2010); *Rios-Valenzuela v. DHS*, 506 F.3d 393, 396 (5th Cir. 2007).

### 1. Applications for Certificate of Citizenship

The Citizenship and Immigration Service (CIS) of the DHS is charged with the adjudication of the citizenship provisions of the INA and is authorized to issue certificates of citizenship to individuals residing in the United States.<sup>193</sup> Applications are made using form N-600 and filed with the CIS district office where the applicant lives.<sup>194</sup> Appeal of the denial of an application for certificate of citizenship is made to the Administrative Appeals Unit (AAU), also part of the CIS.<sup>195</sup>

DHS regulations specify that the citizenship application must be accompanied by “supporting documentary and other evidence essential to establish the claimed citizenship, such as birth, marriage, death, and divorce certificates.”<sup>196</sup> Instructions for filing the N-600 provide more specific guidance on the evidence supporting the application. For proof of U.S. citizenship, the form suggests the applicant file a birth certificate, U.S. passport, or other certificate of naturalization or citizenship issued by the federal government.<sup>197</sup> Listed as suggested evidence of the required period of residence or physical presence is school and employment records, documents relating to ownership or lease of property, social security earnings reports, and “[a]ffidavits of third parties having knowledge of the residence and physical presence.”<sup>198</sup> The instructions further provide that if the suggested documents are not available, other forms may be submitted including affidavits from persons with personal knowledge who “may be relatives and need not be citizens of the United States.”<sup>199</sup>

Additional guidance on supporting evidence of U.S. citizenship for other immigration related applications is in the regulations, and there, DHS distinguishes between what the agency terms “primary and secondary evidence.”<sup>200</sup> For instance, the regulations give preference to primary evidence of the parent’s U.S. citizenship which includes U.S. passports, certificates of naturalization and citizenship, and a state-issued record of birth which provides the individual’s full name, date, place of birth, and was filed within one year of the birth with the official custodian

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193. 8 C.F.R. § 301.1(a) (2010).

194. *Id.* § 301.1(a)(1).

195. *Id.* § 341.6, 103.3(a).

196. *Id.* § 301.1(a)(1).

197. U.S. CITIZEN AND IMMIGRATION SERVS., OMB No. 1615-0057, INSTRUCTIONS FOR N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP, INSTRUCTIONS, at 3–4 (Jan. 2011), available at <http://www.uscis.gov/files/form/n-600instr.pdf>.

198. *Id.* at 4.

199. *Id.*

200. 8 C.F.R. §§ 204.1(g)(1)–(2).

of birth records,<sup>201</sup> and permits submission of secondary evidence when primary evidence is not available.<sup>202</sup> Secondary evidence of citizenship includes hospital and baptismal records, school records, census records, other documents created close to the date of birth, and affidavits of individuals with personal knowledge of the applicant's birth or presence in the United States.<sup>203</sup>

A CIS officer assigned to adjudicate the N-600 has broad authority to investigate an application, conduct examination of witnesses, and report and recommend findings to the district director.<sup>204</sup> A claimant has the right to legal representation, but if not represented, the CIS officer assigned to the application "shall assist him in the introduction of all evidence available in his behalf."<sup>205</sup>

## 2. Citizenship Asserted Before the Department of State

The claimant seeking to acquire citizenship can also file an application for a U.S. passport with the Department of State in lieu of or simultaneous to filing an application for a certificate of citizenship.<sup>206</sup> The statute authorizes the Department of State to administer and enforce citizenship provisions and mandates establishment of a Passport Office.<sup>207</sup> The same evidence would support both applications although the Department of State uses different forms and procedures for issuance of a passport.<sup>208</sup> Because the Department of State and the Department of Homeland Security have concurrent jurisdiction over claims to citizenship, conflicting

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201. *Id.* § 204.1(g)(1).

202. *Id.* § 204.1(g)(2).

203. *Id.*

204. *Id.* § 341.2(d). The statute provides that:

[t]he assigned officer shall have authority to administer oaths or affirmations; to present and receive evidence; to rule upon offers of proof; to take or cause to be taken depositions or interrogatories; to regulate the course of the examination; to examine and cross-examine all witnesses appearing in the proceedings; to grant or order continuances; to consider or rule upon objections to the introduction of evidence; to make a report and recommendation to the district director as to whether the application shall be granted or denied, and make such other action as may be appropriate to the conduct of the examination and the disposition of the application.

*Id.*

205. 8 C.F.R. § 341.2(f).

206. *Id.* § 301.1(a)(1). The regulations provide that individuals residing abroad must apply for evidence of U.S. citizenship at a U.S. embassy or consulate. *Id.* § 301.1(a)(2).

207. INA §§ 104(a),(c), 8 U.S.C. §§ 1104(a), (c) (2006); 22 U.S.C. § 211a (2006); see BRODYAGA, *supra* note 96, at 7–10.

208. 22 C.F.R. § 51.43 (2010); see also 7 GORDON, *supra* note 8, at § 99.06(3)(b)(iv).

determinations are possible.<sup>209</sup> However, a U.S. passport, unless void on its face, is conclusive proof of U.S. citizenship.<sup>210</sup>

U.S. citizens who are abroad may register at a U.S. consulate to establish a claim of citizenship.<sup>211</sup> The regulations prescribe procedures for registration of U.S. citizenship,<sup>212</sup> for registration of a child's birth abroad,<sup>213</sup> and for filing an application for a U.S. passport.<sup>214</sup> The State Department makes no provision for representation by an attorney, "except in administrative proceedings challenging the denial of passports."<sup>215</sup> Furthermore, the regulations fail to provide for an administrative hearing to review the denial of a U.S. passport based on a decision that the applicant is not a U.S. citizen.<sup>216</sup>

### 3. Removal Proceedings

If an application for a certificate of citizenship is denied, DHS may institute removal proceedings where the citizen claimant can again assert the claim and request the immigration judge to review the evidence. An individual that was not previously aware of a claim to citizenship and has not filed an application for certificate of citizenship or U.S. passport, can also assert the claim while in removal proceedings.<sup>217</sup> Removal proceedings are initiated by the DHS and heard before immigration courts, part

209. See Gary Endelman, *How to Prevent Loss of Citizenship*, IMMIGRATION BRIEFINGS, Nov. 1989, at 6 (stating that "ordinarily neither Department will interfere with the other's decision").

210. *In re Villanueva*, 19 I&N Dec. 101, 102 (B.I.A. 1984). Further, a decision in favor of citizenship establishes the claim unless there is clear, convincing and unequivocal evidence to the contrary. *Lee Hon Lung v. Dulles*, 261 F.2d 719, 724 (9th Cir. 1958) (holding that a favorable government determination of citizenship may not be disregarded absent error or fraud "established by evidence which is clear, unequivocal, and convincing").

211. 22 C.F.R. § 50.2; 7 GORDON, *supra* note 8 at § 91.03(2)(b).

212. 22 C.F.R. § 50.3.

213. *Id.*; see also *DOS Announces Redesigned Consular Report of Birth Abroad*, 88 INTERPRETER RELEASES 117 (2011).

214. 22 C.F.R. § 50.4.

215. 7 GORDON, *supra* note 8, at § 91.04(2).

216. The regulations provide for review before the Bureau of Consular Affairs when denial or revocation of a U.S. passport is based on factors listed in 22 C.F.R. § 51.60, such as fugitive warrants, extradition, or national security. 22 C.F.R. §§ 51.60, 51.70(a). Review of loss of citizenship is available at the Board of Appellate Review (BAR). 22 C.F.R. § 7.3(a). However, the DOS provides no hearing for review based on "non-nationality." 22 C.F.R. § 51.70(b)(1); see also 7 GORDON, *supra* note 8, at § 99.06(4)(c); ENDELMAN, *supra* note 209, at 3-5.

217. See *Ortega v. Holder*, 592 F.3d 738 (7th Cir. 2010) (in a claim to citizenship as a defense to removal proceedings, the INS office denied an application for certificate of citizenship, but shortly thereafter, the immigration judge "terminated the removal proceedings[,] . . . determin[ing] that she had 'established that she acquired U.S. Citizenship . . . .'" ) *Rios-Valenzuela v. DHS*, 506 F.3d 393, 396 (5th Cir. 2007) (providing

of the U.S. Department of Justice Executive Office for Immigration Review (EOIR).<sup>218</sup> However, removal is a civil, not criminal, proceeding, and while the INA guarantees the right to counsel, there is no right to an attorney at government expense.<sup>219</sup>

Because removal proceedings determine whether a non-citizen may be admitted or may remain in the United States, the immigration court has no jurisdiction over citizens of the United States.<sup>220</sup> The first allegation in the Notice to Appear (NTA), the document which initiates removal proceedings, is that the respondent is “not a citizen or national of the United States.” Consequently, citizenship claims may be raised in immigration court as a challenge to the jurisdiction of the court, and the immigration judge can thus decide a claim to acquired citizenship.<sup>221</sup> At this point, the respondent may deny the first allegation, and the court can then consider whether there is sufficient evidence to terminate the proceedings.<sup>222</sup>

However, removal proceedings are not a direct appeal from denial of a certificate of citizenship or U.S. passport. The immigration judge can terminate the proceedings based on the evidence of citizenship and the judge’s order may support the claimant’s efforts to obtain a certificate of citizenship from DHS or a U.S. passport from the Department of State (DOS),<sup>223</sup> but the immigration judge does not have the power to confer U.S. citizenship.<sup>224</sup> An individual who is in removal proceedings and did

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procedural history in which appellant, believing himself to be a U.S. citizen, reentered by claiming citizenship and was subsequently charged with “criminal illegal reentry”).

218. 8 C.F.R. §§ 1003.0, 1003.12; Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1306 (1986).

219. INA § 292, 8 U.S.C. § 1362 (2006). See Hiroshi Motomura, *Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication: The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1773 (May 2010) (stating that in long-standing precedent, the U.S. Supreme Court does not view deportation or removal as a criminal punishment, hence it does not warrant Sixth Amendment protections).

220. *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2005) (stating that “[t]he executive may deport certain aliens but has no authority to deport citizens”).

221. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“The claim of citizenship is thus a denial of an essential jurisdictional fact.”).

222. The statute at INA § 240 provides that “[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” 8 U.S.C. § 1229a.

223. See *infra* Part V.A.

224. See, e.g., *INS v. Pangilinan*, 486 U. S. 875, 883–84 (1988) (discussing Congress’s intent to not give power to the federal courts to deny or grant citizenship). Thus, while the immigration judge may terminate a removal proceeding, the DHS is not required to honor the decision and issue a certificate of citizenship. *Ortega v. Holder*, 592 F.3d 738, 742 (7th Cir. 2010); *Rios-Valenzuela v. DHS*, 506 F.3d 393, 396 (5th Cir. 2007).



not apply for a certificate of citizenship or a U.S. passport has two options. One is to request that the proceedings be postponed to apply for a certificate of citizenship or U.S. passport. The other is to present the claim to the judge, request the proceedings be terminated, and then submit applications to DHS for the certificate of citizenship or to the DOS for a U.S. passport.<sup>225</sup>

The citizenship claim may be made by individuals in the United States or those who apply for admission to the United States from abroad. While generally the burden of proof rests with the DHS to prove that the respondent “is not a citizen or national of the United States,” that burden is met by evidence that an acquired citizen claimant was born abroad.<sup>226</sup> The burden shifts to the claimant to demonstrate that at the time of his or her birth the transmitting parent was a citizen and established all other conditions precedent to the acquisition of citizenship.<sup>227</sup> If the claim is established and the DHS is unable to counter the evidence, the immigration judge will terminate the proceedings. Appeal of a final order of removal in which citizenship is an issue must be made to the Board of Immigration Appeals<sup>228</sup> within thirty days of the order of the immigration judge as in any other appeal of a removal order.<sup>229</sup>

### C. Federal Court Review

The statute currently provides separate means for federal court review of a claim to citizenship depending on the manner the claimant asserted his or her claim. An action for declaratory judgment can be brought in federal district court to challenge the denial of an application for certificate of citizenship or U.S. passport. When a claim to citizenship is raised in removal proceedings, federal court review of the removal order is channeled to the courts of appeal with the opportunity for remand to the district court for a hearing on citizenship.<sup>230</sup> However, there has been considerable congressional action in the area of judicial review of deportation and removal orders and efforts by Congress to limit access to fed-

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225. See generally MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 5.13 p. 179 (West 2011).

226. See *In re Tijerina-Villareal*, 13 I&N Dec. 327, 330 (B.I.A 1969) (stating that the burden is on the government “to establish alienage in a deportation proceeding”).

227. *Id.*

228. “The Board of Immigration Appeals was created in 1940” and now operates within the Executive Office for Immigration Review of the Department of Justice. Legomsky, *supra* note 218, at 1307.

229. 8 C.F.R. §1003.3(a)(2) (2010).

230. *Ortega*, 592 F.3d at 743–44 (ruling that an applicant cannot file a declaratory action in district court as a means to “frustrate Congress’s effort to channel all appeals from removal proceedings”).

eral courts now impacts the review of removal orders with appended citizenship claims.

### 1. Early Judicial Review

In early cases, claims to U.S. citizenship were addressed under the court's habeas corpus jurisdiction.<sup>231</sup> In *Ng Fung Ho*, the petitioners challenged the executive orders of deportation by an application for writ of habeas corpus in federal district court.<sup>232</sup> Actions brought under the Declaratory Judgment Act (DJA) and the Administrative Procedures Act (APA) later served as additional routes for federal court determinations of citizenship.<sup>233</sup> In *Perkins v. Elg*,<sup>234</sup> the petitioner filed suit for declaratory and injunctive relief to challenge the denial of her passport on the ground that she had lost her citizenship,<sup>235</sup> and in *Frank v. Rogers*,<sup>236</sup> a U.S. citizen claimant successfully brought an action under the APA.<sup>237</sup>

The 1952 Act provided for a special declaratory judgment remedy to review the claims to U.S. citizenship of individuals present in the United States.<sup>238</sup> Then, in 1961, during an overhaul of the provisions for judicial review of deportation and exclusion orders, Congress enacted INA Section 106 to limit protracted litigation in immigration cases and channel review of deportation orders to the courts of appeal.<sup>239</sup> The statute established a procedure under INA Section 106(a)(5) for review of citizenship claims raised in deportation proceedings that also authorized a transfer of proceedings to the district court for a hearing de novo if “a

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231. *Weedin v. Chin Bow*, 274 U.S. 657, 658–59 (1927); *Ng Fung Ho v. White*, 259 U.S. 276, 282 (1922); *United States v. Ju Toy*, 198 U.S. 253, 258 (1905); *United States v. Wong Kim Ark*, 169 U.S. 649, 649 (1898).

232. *Ng Fung Ho*, 259 U.S. at 277–78.

233. See *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955) (“[T]here is a right of judicial review of deportation orders other than by habeas corpus and that the remedy sought here [under the Administrative Procedure Act] is an appropriate one.”); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461–62 (2006) (asserting that with the INA of 1952 coupled with the decision in *Shaughnessy*, individuals could challenge deportation and exclusion orders without the physical custody requirement of a habeas proceeding).

234. 307 U.S. 325 (1939).

235. *Perkins v. Elg*, 307 U.S. 325, 349–50 (1939).

236. 253 F.2d 889 (D.C. Cir. 1958).

237. *Frank v. Rogers*, 253 F.2d 889, 892 (D.C. Cir. 1958). The court, citing *Ng Fung Ho v. White*, stated that historically the habeas corpus proceeding was an appropriate venue for the review of a citizenship claim raised in deportation proceedings, and that the APA also served the same function. *Id.*; see *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) (applying the APA to deportation proceedings).

238. INA § 360(a), 8 U.S.C. § 1503(a) (1995). The statute provided for an action in district court to review a decision denying a right or privilege based on U.S. citizenship. *Id.*

239. Motomura, *supra* note 233, at 462–63.

genuine issue of material fact as to the petitioner's nationality is presented."<sup>240</sup> These two avenues, actions for declaratory judgment and petitions for review became the dominant means for review of citizenship claims until 1996.<sup>241</sup>

## 2. Declaratory Judgment

INA Section 360 permits an action for declaratory judgment on behalf of an individual who is in the United States and claims to be a citizen, but is "denied such right or privilege by any department or independent agency or official . . . ."<sup>242</sup> The claimant may sue in federal district court on the question of citizenship.<sup>243</sup> It is used when an application for proof of citizenship has been denied, such as when the State Department Passport office declines to issue a U.S. passport or when the CIS rejects an application for a certificate of citizenship. The burden rests with the petitioner to prove his or her claim to U.S. citizenship and the district court will ordinarily require that the claimant exhaust all administrative remedies before the individual files an action for declaratory judgment.<sup>244</sup>

The statute provides that the right to bring a declaratory judgment suit is limited to individuals who are present in the United States.<sup>245</sup> A U.S.-citizen claimant outside the United States who is denied "a right or privilege as a national" is directed to apply for a certificate of identity from a U.S. consulate and seek admission to the United States. However, despite the statutory requirement that the petitioner must be present in the United States, the Supreme Court has ruled that district courts have jurisdiction to hear cases of individuals outside the United States who assert a right to citizenship.<sup>246</sup>

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240. INA § 106(a)(5)(B); 8 U.S.C. § 1105a(a)(5)(B) (1995) (no longer in force).

241. Habeas corpus proceedings remained an avenue for review of a denial of citizenship. Despite Congressional efforts to direct appeals to the court of appeals, the statute permitted habeas corpus review of orders of exclusion and further provided that "an alien held in custody pursuant to an order of deportation" could obtain review in habeas proceedings. INA § 106(b), 8 U.S.C. § 1105a(b) (no longer in force); see Motomura, *supra* note 233, at 463 (discussing habeas proceedings in reference to the Hobbs Act). However, during the period between enactment of former INA § 106, 8 U.S.C. § 1105a and the 1996 legislation in AEDPA and IIRIRA, habeas review of deportation cases, while available, was used in "narrow circumstances as a supplement to petitions for review in the courts of appeals." Kolkevich v. Att'y Gen., 501 F.3d 323, 327 (3rd Cir. 2007) (quoting Motomura, *supra* note 233, at 463).

242. INA § 360(a), 8 U.S.C. § 1503(a) (2000).

243. *Id.*

244. United States v. Breyer, 41 F.3d 884, 891-92 (3rd Cir. 1994).

245. INA § 360(a), 8 U.S.C. § 1503(a) (2000).

246. See Rusk v. Cort, 369 U.S. 367, 372 (1962) (holding that the Administrative Procedure Act is available for review of an administrative decision regarding citizenship); see also Frank v. Rogers, 253 F.2d 889, 890 (D.C. Cir. 1958).

Under the terms of the statute as enacted in 1952, a citizen claimant could not bring an action for declaratory judgment if the claim arose in exclusion proceedings.<sup>247</sup> With the IIRIRA Congress amended INA Section 360 to extend the limitation for an action in district court when the claim to citizenship “arose by reason of, or in connection with any removal proceeding . . . or is in issue in any such removal proceeding.”<sup>248</sup> District court review of an agency denial of a claim to citizenship benefits the citizen claimant but is considered by the government as an interference with the removal process and frustration of Congress’s attempts to channel all review of removal orders in the courts of appeal. In *Rios-Valenzuela v. DHS*,<sup>249</sup> the petitioner raised his claim to citizenship in removal proceedings and also applied for a certificate of citizenship before DHS.<sup>250</sup> Following the denial of his application for certificate of citizenship he sought a declaratory judgment in district court.<sup>251</sup> The Fifth Circuit ruled that INA Section 360(a) precluded review of the decision since the petitioner’s citizenship claim arose in his removal proceedings.<sup>252</sup>

### 3. Review of Removal Orders

Since 1961 when INA Section 106 was enacted, Congress has consistently provided a means for review of citizenship claims made by individuals in deportation (and later, removal) proceedings. INA Section 106(a)(5) authorized the court of appeals to review a citizenship issue raised in deportation proceedings and to remand to the district court the cases that presented unresolved issues of fact.<sup>253</sup>

In April 1996 with the enactment of AEDPA, Congress again attempted to streamline judicial review in deportation cases and targeted noncitizens charged under crime-based grounds of deportation.<sup>254</sup> A few months later in September 1996, Congress enacted IIRIRA and replaced

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247. See Benson, *supra* note 26, at 1450 n.185 (discussing the holding in *Rusk* as it pertains to exclusion proceedings and the claimant’s case).

248. INA § 360(a), 8 U.S.C. § 1503(a) (2000).

249. 506 F.3d 393 (5th Cir. 2007).

250. *Rios-Valenzuela v. DHS*, 506 F.3d 393, 396 (5th Cir. 2007).

251. *Id.*

252. *Id.* at 397.

253. INA § 106(a)(5)(B); 8 U.S.C. § 1105a(a)(5)(B) (1995) (no longer in force). Despite Congress’s efforts to direct appeals to the court of appeals, the statute permitted habeas corpus review of orders of exclusion, and further provided that “an alien held in custody pursuant to an order of deportation” could obtain review in habeas proceedings. INA § 106(b), 8 U.S.C. 1105a(b) (no longer in force).

254. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, §§ 440–42, 110 Stat. 1214.

Section 106 with new Section 242.<sup>255</sup> IIRIRA mirrored AEDPA's provisions eliminating judicial review of orders based on criminal convictions.<sup>256</sup> Furthermore, IIRIRA consolidated deportation and exclusion proceedings into what has become removal proceedings,<sup>257</sup> designated the courts of appeals as the sole avenue of judicial review of removal orders,<sup>258</sup> and reduced the deadline for filing a petition for review in the court of appeals to thirty days.<sup>259</sup>

When IIRIRA replaced Section 106 with Section 242, it did not disturb the provisions previously guaranteeing review of claims to citizenship made in removal proceedings.<sup>260</sup> INA Section 242(b)(5)(A) specifies that if the respondent in removal proceedings has asserted U.S. citizenship and the court finds "no genuine issue of material fact about the petitioner's nationality," the court of appeals shall determine the claim to citizenship.<sup>261</sup> The court must consider the claim to citizenship *de novo*.<sup>262</sup> When an issue of fact relating to the respondent's citizenship is raised in the court of appeals "the court *shall* transfer the proceedings to the district court . . . for a new hearing on the nationality claim."<sup>263</sup> The determination as to whether a material fact issue exists is based on standards governing summary judgment motions.<sup>264</sup>

Challenges to the restrictions on judicial review prompted by AEDPA and IIRIRA were swift, most notably on behalf of non-citizen legal residents who had been convicted of the criminal offenses for which the

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255. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, § 306, 110 Stat. 3009; Motomura, *supra* note 233, at 464.

256. Compare AEDPA § 440(a) (amending INA § 106 to prohibit "review by any court" for criminal aliens who are ordered removed) with IIRIRA § 306(a)(2) (creating a new section specifying when judicial review would be eliminated).

257. IIRIRA § 304.

258. *Id.* § 306(b)(2) (outlining the venue and form of appeals). INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2006). The appellate court is expected to review the appeal using only the administrative record. IIRIRA § 306(b)(4) (codified at INA § 242(b)(2), 8 U.S.C. § 1212(b)(2) (2006)). The standard of review is a reasonable basis standard and discretionary judgments are conclusive "unless manifestly contrary to the law and an abuse of discretion." *Id.* (codified at INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (2006)).

259. *Id.* § 306(b)(1) ("[t]he petition for review must be filed not later than 30 days after the date of the final order or removal.") (codified at INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2006)).

260. INA § 242(b)(5), 8 U.S.C. 1252(b)(5).

261. INA § 242(b)(5)(A), 8 U.S.C. § 1252(b)(5)(A); *Lopez v. Holder*, 563 F.3d 107, 110 (5th Cir. 2009).

262. INA § 242(b)(5)(A); *Lopez*, 563 F.3d at 110; *Scales v. INS* 232 F.3d 1159, 1162 (9th Cir. 2000).

263. INA § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B) (emphasis added); *Lopez*, 563 F.3d at 110; *Alexander v. INS*, 74 F.3d 367, 368 (1st Cir. 1996).

264. *Batista v. Ashcroft*, 270 F.3d 8, 13 (1st Cir. 2001); *Alexander*, 74 F.3d at 368.

new legislation eliminated review.<sup>265</sup> To support their efforts to access federal courts, respondents utilized petitions for writs of habeas corpus and argued that AEDPA and IIRIRA could not, without violation of the Suspension Clause of the U.S. Constitution,<sup>266</sup> be interpreted as having eliminated habeas corpus jurisdiction for judicial review of deportation and removal orders. In two cases, *INS v. St. Cyr*<sup>267</sup> and *Calcano-Martinez v. INS*,<sup>268</sup> the Supreme Court held that AEDPA and INA Section 242 did not completely divest federal courts of habeas jurisdiction in removal cases.<sup>269</sup> In *St. Cyr* the Court ruled that petitioner was entitled to an opportunity to challenge “the erroneous application or interpretation” of law.<sup>270</sup> To avoid the serious constitutional questions implicated by the Suspension Clause if Congress failed to provide an adequate substitute for habeas review of deportation and removal orders and absent “a clear statement of congressional intent to repeal habeas jurisdiction,” the Court found that habeas corpus relief survived AEDPA and IIRIRA.<sup>271</sup>

Thus, subsequent to *St. Cyr* there were two means of reviewing removal orders, by appeal to the courts of appeal under INA Section 242 and by a habeas corpus petition.<sup>272</sup> Courts generally acknowledged congressional preference for the court of appeals route, but notwithstanding, habeas proceedings provided an avenue when an issue of citizenship was raised. The Ninth Circuit addressed the exercise of habeas jurisdiction in *Rivera v. Ashcroft*,<sup>273</sup> a case concerning an individual with two conflicting birth certificates from Mexico and the United States. The respondent waived counsel and the right to appeal his deportation order, but subsequently filed a habeas petition in the district court.<sup>274</sup> The court rejected

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265. *INS v. St. Cyr*, 533 U.S. 289, 293 (2001).

266. The Suspension Clause of the Constitution provides that the “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl.2.

267. 533 U.S. 289 (2001).

268. 533 U.S. 348, 351 (2001).

269. *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (holding that judicial review and habeas corpus are separate, distinct proceedings); *St. Cyr*, 533 U.S. at 305 (holding that IIRIRA’s limitations on judicial review did not repeal habeas corpus jurisdiction in district courts).

270. *St. Cyr*, 533 U.S. at 302; see Lenni Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 38 (2006) (affirming that “courts are loathe to find a complete bar to judicial review”).

271. *St. Cyr*, 533 U.S. at 298.

272. AEDPA, IIRIRA, and the decision in *INS v. St. Cyr* led to a renewed use of habeas corpus proceedings as a means for federal court review of removal orders. Motomura, *supra* note 233, at 460.

273. 394 F.3d 1129 (9th Cir. 2005).

274. *Rivera v. Ashcroft*, 394 F.3d 1129, 1133 (9th Cir. 2005).

the petition and on appeal to the court of appeals, the Ninth Circuit found that the availability of habeas relief was “[t]he only result consistent with the” Constitution.<sup>275</sup> The court also held that citizenship is “an essential jurisdictional fact” in deportation proceedings,<sup>276</sup> and that any person who asserts a non-frivolous claim to U.S. citizenship is entitled to “a judicial evaluation of that claim.”<sup>277</sup>

Three months after *Rivera*, in May 2005, Congress renewed its efforts, begun with AEDPA and IIRIRA, to streamline judicial review of removal orders in a single forum, the court of appeals.<sup>278</sup> The passage of the REAL ID Act eliminated habeas corpus review of removal orders.<sup>279</sup> But, to forestall the serious constitutional questions identified in *St. Cyr*, Congress amended INA Section 242 and restored review of removal orders in the courts of appeal for “constitutional claims or questions of law”<sup>280</sup> although the statute maintained restrictions to review of removal orders involving criminal aliens<sup>281</sup> and applicants for discretionary relief.<sup>282</sup>

The question remaining after the REAL-ID Act’s limitation on habeas corpus relief is whether amended INA Section 242, even with protections for review of citizenship claims, provides adequate and effective review. This issue will be discussed in Part V below.

#### IV. ASSERTING CLAIMS BEFORE DHS AND DOS

Historically, many Mexican children born abroad to U.S. citizen parents have faced significant obstacles to the recognition of their acquired U.S. citizenship. They bear a burden of establishing eligibility and doubts are “resolved in favor of the United States and against the claimant.”<sup>283</sup> The cases are often difficult to prove before any agency or court because, as illustrated from the fact patterns in the cases presented here, there may be scant and sometimes no documentary evidence to support the parent’s birth in the United States and presence in the United States prior to the

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275. *Id.* at 1138.

276. *Id.* at 1136 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

277. *Id.*

278. *Lopez v. Holder*, 563 F.3d 107, 109 (5th Cir. 2009).

279. *See Benson*, *supra* note 270, at 43.

INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(D) (2000).

280. *Id.*

281. *Id.* § 242(a)(2)(C), 8 U.S.C. § 1252(a)(C) (aliens removable under INA § 212(a)(2) or § 237(a)(2)(A)(iii), (B), (C), or (D)).

282. *Id.* § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (relating to decisions involving discretionary relief, including under INA §§ 212(h), 212(i), 240A, 240B, and 245).

283. *United States v. MacIntosh*, 283 U.S. 605, 626 (1931) (quoting *United States v. Manzi*, 276 U.S. 463, 467 (1928)).

birth of the child. In addition to the factual and legal complexities of the cases, other barriers within the agencies charged with adjudicating citizenship claims contribute to the denial of claims and even the deportation/removal of U.S. citizens.

First, the agencies struggle under enormous and complex caseloads. Both DHS and DOS adjudicate an extraordinary number of applications under multiple parts of an exceedingly intricate statute that encompasses immigration and citizenship issues. They are not equipped to expeditiously and consistently handle the kinds of applications for certificate of citizenship, which are described here and involve difficult issues of fact.

Furthermore, there is the lack of attention and indifference within the government to claims of acquired citizenship. Concern over crime and national security issues dominate both agencies, particularly the enforcement arms of DHS, Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP), and overshadow the cases of acquired citizens. Individuals with a U.S. parent and a claim to acquired citizenship are frequently ignored by DHS and DOS and consequently, many potential beneficiaries do not learn of the right to make a claim.

#### A. *Citizenship Claims in CIS*

CIS has the task of adjudicating a large volume of applications for an extended variety of benefits. There were a total of 4,831,371 applications filed with CIS in fiscal year 2010, including petitions and adjustment of status applications for family- and employment-based visas, employment authorizations, non-immigrant visas, asylum, and self-petitions for battered spouses and children of U.S. citizens and legal residents.<sup>284</sup>

Further complicating the sheer number of cases is the complexity of the law.<sup>285</sup> Besides the INA and regulations, decisions in administrative appeals from the Administrative Appeals Unit and the Board of Immigration Appeals provide guidance on the law. The complex legal and processing questions confronting CIS adjudicators are further covered in

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284. U.S. CITIZEN AND IMMIGRATION SERVS., APPLICATIONS FOR IMMIGRATION BENEFITS MONTHLY CHART 1 (Aug. 2011), available at <http://www.uscis.gov/USCIS/Resources/Reports/Application-for-Benefits/applications-for-benefits-2011-aug.pdf>. The processing and adjudication of the vast array of CIS benefits applications is delegated between regional service centers and district offices located throughout the United States. CIS has further centralized the adjudication of certain specialized benefits such as asylum application, self-petitions for battered spouses and children, and U-visa applications for victims of crime.

285. See Legomsky, *supra* note 218, at 1300 (stating that “[t]he governing statute and accompanying regulations authorize a bewildering array of administrative decisions in individual cases). Initial decision making is by various officials in various agencies after various procedures.” *Id.* (internal citations omitted).



a labyrinth of policy and practice memoranda issued from central and regional DHS offices.

CIS has delegated the processing and adjudication of applications for certificate of citizenship, including those filed under INA Sections 301 and 309, to the district offices. Some of the applications can be processed and adjudicated with little controversy, but given the volume of cases it handles, the limitations on resources, and complexity of the law, CIS is not equipped to properly adjudicate citizenship claims with difficult factual and legal issues. The problems raised in these cases are similar to what has been found in studies regarding DHS benefits adjudications. Critical of the agency's handling of applications for immigration benefits, Professor Lenni Benson found regarding the adjudication of employment based visas that the "integrity, efficiency and transparency" of the system was threatened by an adjudicatory structure of multi-agency participation with each application, layers of confusing guidance, and an obsession with fraud.<sup>286</sup> Professor Jill Family argues that in CIS adjudications there are an extraordinary number of applications handled by non-lawyers and guided by uncertain legal standards, all leading to a system she termed "unpredictable and obscure."<sup>287</sup>

An application for certificate of citizenship presented to DHS can be resolved with little controversy if applicant has documentary evidence that is favored by the agency. The child born abroad to a U.S. citizen parent who was born in a physician-assisted facility and who has a consistent record of education and employment in the United States can present a successful application for certificate of citizenship.<sup>288</sup> However, cases that present difficult and complicated factual and legal analysis may be stalled for months or even years.<sup>289</sup>

The regulations permit applicants to submit a wide range of evidence to support an application for benefits under the INA, but CIS adjudicators often dismiss evidence it does not consider objective. In their concern with possible fraud, CIS adjudicators are particularly suspicious and critical of the testimony affidavits of witnesses which they consider subjective and self-serving, and many children of U.S. citizen parents who are indi-

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286. Lenni Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 262–268, 289–290 (2002); see Legomsky, *supra* note 218, at 1313 (goals for an administrative process should be accuracy, efficiency, acceptability and consistency).

287. Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASSOC. ADMIN. L. JUDICIARY 45, 64–67 (2011).

288. See BRODYAGA, *supra* note 96, at 5.

289. See Email from Lisa S. Brodyaga, *supra* note 96; Email from Barbara Hines, *supra* note 108.

gent migrants and who depend on testimonial evidence are left with few options.

### 1. Birth in the United States

To establish the parent was born in the United States, CIS favors state-issued birth certificates indicating a physician-assisted birth.<sup>290</sup> The agency will accept church baptismal certificates, delayed birth records, and midwife recorded registrations if supplemented by other evidence of birth in the United States, but many officers question the validity of these birth records. Once fraud is suspected, applicants must await a lengthy investigation and face a heavy burden to convince a skeptical adjudicator.

The applications for certificates of citizenship for four of J.Z.'s children included J.Z.'s delayed certificate of birth in Big Spring, Texas and the Mexican birth record stating J.Z. was born in "Viges Prin, Texas." The INS launched an investigation into J.Z.'s birth and, prompted by a request from the U.S. Consulate in Monterrey, Mexico, the Mexican government issued a birth certificate, which the U.S. Consulate authenticated, which reported that J.Z. was born in the "Estados Unidos de Mexico," the United States of Mexico. The certificate, however, recorded no city and state of birth. Armed with a verified but facially invalid Mexican birth certificate, the INS officer adjudicating the applications informed J.Z. that he was a non-citizen who was not entitled to be in the United States, and that his children's applications were to be denied. Ultimately the four applications were approved but only after a law student's extraordinary efforts. The student located the only living witness to J.Z.'s birth, a woman who was six-years-old at the time and remembered her own mother attending to J.Z.'s mother one night in a barn in Big Spring, Texas and the next morning waking to see the baby.<sup>291</sup> The student then traveled to the small village in Mexico where J.Z.'s father recorded the birth in 1939, located the original handwritten birth record in a dusty archive, and convinced the Mexican authorities to rescind the incorrect birth record and established for INS that "Viges Prin, Texas" meant "Big Spring, Texas."<sup>292</sup>

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290. See Jordan, *supra* note 97 (reporting that midwives' forging of birth certificates has resulted in requirements for further proof).

291. See Affidavit of A.M. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

292. It was never determined why the Mexican government issued an erroneous birth certificate and one that failed to provide a key piece of data, the city and state where J.Z. was alleged to be born. Once directed to the original handwritten record, the Mexican registrar readily issued a corrected and certified copy reflecting that J.Z. was born in "Viges Prin, Texas." I can only surmise that officials of the DHS and the DOS presumed that the Mexican registration recorded a Mexican birth and the Mexican authorities were

The circumstances of J.Z.'s birth illustrate common problems faced by U.S. citizens when they attempt to return to the United States and to establish citizenship for their own children. Frequently, because they lack official and contemporaneous records of birth in the United States, they depend on documents such as a baptismal certificate issued by the local Catholic Church or a school record.<sup>293</sup> From these documents they apply for a delayed state certificate of birth. For example, J.Z. obtained his delayed Texas birth certificate by presenting a 1940 baptismal record from a Mexican church and affidavits from his mother.<sup>294</sup> While the Board of Immigration Appeals (BIA) in *In re Serna*,<sup>295</sup> acknowledged that many individuals were not born in a hospital, it found "there can be little dispute that the opportunity for fraud is much greater with the delayed birth certificate."<sup>296</sup> Taking this cue from the BIA holding, many adjudicators consider a delayed certificate of birth suspect, warranting an often lengthy investigation.

The DHS also routinely investigates birth certificates executed by midwives, another record common for children of Mexican migrants. INS mounted aggressive investigations of a number of midwives who serve the low income population of Texas and criminally prosecuted some for having issued fraudulent birth records for Mexican born children.<sup>297</sup> Al-

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influenced by the U.S. officials who requested the Mexican birth registration. A complaint to the U.S. Consulate at Monterrey, N.L. Mexico that had "certified" the Mexican birth certificate was never answered.

293. Baptismal and school records were commonly used as evidence of birth in the United States. *In re Pagan*, 22 I&N 547, 548 (B.I.A. 1999). The federal government often requests the "oldest available evidence." *Id.*; BRODYAGA, *supra* note 96, at 2. However, when that evidence is contradicted by other evidence of birth abroad, the individual may not be able to definitively prove U.S. citizenship. See *In re A.M.*, 7 I&N Dec. 332, 335 (B.I.A. 1956) (considering competing evidence from family members' against school records and census records). There, the respondent's evidence of birth consisted of a school record and a census report. *Id.* All other records and affidavits state she was born in Mexico. *Id.* "The Government did not sustain the burden of proving that she was an alien, and she was unable to prove that she is a citizen." *Id.* at 336.

294. Texas law permits the use of such documents to support an application for delayed birth certificate. See generally *Delayed Certificate of Birth Registration*, *supra* note 100 (outlining the procedures for filing a delayed birth certificate and the suggested types of supporting documents—specifically baptismal records and birth affidavits are suggested as documents that might show parent's names).

295. 16 I&N Dec. 643, 645 (B.I.A. 1978).

296. *In re Serna*, 16 I&N Dec. 643, 646 (B.I.A. 1978); accord *In re Herrera*, 13 I&N Dec. 755 (B.I.A. 1971) (holding that a delayed birth certificate, even with supporting evidence does not establish citizenship in every case).

297. DHS frequently challenges births recorded by midwives on the Texas border with Mexico. When midwife birth certificates are used to support birth in the United States, DHS demands additional evidence or will conduct an investigation. The suspicion is based largely on the prosecution of a Texas midwives for selling Texas birth certificates. See

though the government in the criminal cases never alleged that every certificate issued by these midwives was fraudulent, their convictions cast doubt not only on all of the birth records they have attested to, but to the records of Texas midwives in general.

DHS maintains a more expansive list of midwives that the agency believes have issued fraudulent birth certificates.<sup>298</sup> The list does not specify the charges against the named midwives and some on the list have never been convicted of an offense.<sup>299</sup> Applicants and their advocates have difficulty responding when DHS has adopted a presumption that a birth certificate executed by a listed midwife does not establish citizenship.

It is not uncommon for Mexican parents, such as J.Z.'s father, to record their children's births with a Mexican registry although the children were born in the United States.<sup>300</sup> Investigations of delayed certificates, church baptismal records, and midwife records include searches of Mexican registries to determine whether the birth was recorded abroad. INS/DHS will presume the birth occurred in Mexico if a registration of birth in Mexico is located.<sup>301</sup> The registration may have resulted from the parents' attempts to obtain identification or schooling for a U.S.-born child when there was no registration in the United States, but such explanations rarely overcome the presumption by CIS that the birth occurred in Mexico.<sup>302</sup> Individuals seeking to establish U.S. citizenship for admission

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United States v. Lopez, 704 F.2d 1382, 1383 (5th Cir. 1983) (deciding the case of Emma Lopez, who was accused of selling birth certificates for around two hundred dollars); see also Jordan, *supra* note 97; *Midwives Deliver New Problems in Citizenship*, HOUS. CHRON., (July 20, 2008), at B7 (reporting that seventy-five midwives were convicted for selling birth certificates in the last forty years).

298. One list maintained by the DHS in San Antonio includes 248 Texas midwives. Some are listed with dates when convicted, had a license revoked, or "confessed." (list on file with *The Scholar: St. Mary's Law Review on Minority Issues*). See also BRODYAGA, *supra* note 96, at 2.

299. After some effort one attorney who was representing an individual whose birth record was challenged by DHS, was able to locate the conviction record of a listed midwife and found she had been convicted of "falsifying birth records for Mexican babies that were being illegally adopted by U.S. citizen families." Email from Rebecca Bernhardt, Att'y, Criminal Justice Coalition, to Lee Terán, Clinical Professor of Law, St. Mary's Univ. Sch. of Law (Sept. 24, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). The attorney successfully argued on behalf of her client, who was not an adopted child, that the birth record was valid. *Id.*

300. *In re Lugo-Guadiana*, 12 I&N Dec. 726, 727 (B.I.A. 1968).

301. Even when the Mexican birth registration records a child's birth as having occurred in the United States, the federal government will question the veracity of the record. See *supra* note 292.

302. See *In re Lugo-Guadiana*, 12 I&N Dec. at 729–30 (providing that the Board gave little weight to a delayed certificate of birth when a Mexican certificate was registered

to the United States or as proof of a child's acquisition of citizenship carry a heavy burden to explain the conflicting and unexpected evidence and will risk removal when dual competing records are found in both the United States and Mexico.

## 2. Evidence of Presence

The citizenship statutes require that the transmitting U.S. citizen parent accumulate a certain number of years of presence in the United States prior to a child's birth. Each time it has amended the relevant statutes Congress has reduced the mandated length of presence in the U.S. The Nationality Act of 1940 required that the parent demonstrate ten years *residence* in the United States, at least five of which were after the parent attained the age of sixteen.<sup>303</sup> Residence, which is defined as a fixed abode in the United States is understandably a difficult standard to meet. A U.S. citizen parent who maintained a family in Mexico and traveled to the United States may face obstacles to prove a residence in the country.<sup>304</sup> The Immigration and Nationality Act of 1952 liberalized the standard to ten years of *physical presence* in the United States, five of which were after the age of fourteen.<sup>305</sup> The presence standard often better fits the circumstances of the U.S. citizens who have families in Mexico and live there at least part of the year. In these situations, a parent may be able to more easily establish presence in the United States than residence, for example, through employment in the United States prior to the birth of the child.

However, in practice, both the Board of Immigration Appeals and CIS discount affidavit and testimonial evidence from relatives and families to the detriment of Mexican migratory workers who may be forced to rely on this type of proof. As the Board stated in *In re Tijerina-Villareal*,<sup>306</sup> “[e]xperience has demonstrated in cases of this character that the testimony of parties in interest cannot always be accepted or relied upon.”<sup>307</sup> Consequently, CIS demands documentary evidence of the parent's pres-

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twelve days after the birth and the witnesses, respondent's parents and aunt “are not disinterested parties”).

303. Nationality Act of 1940, ch. 876, Pub. L. No. 76-853, § 201(g), 54 Stat. 1137, 1169 (emphasis added).

304. *Alvarez-Garcia v. Ashcroft*, 293 F.3d 1155, 1156 (9th Cir. 2002).

305. INA § 322(a)(2), 8 U.S.C. § 1433(a)(2) (2006) (emphasis added).

306. 13 I&N Dec. 327 (B.I.A. 1969). While *In re Tijerina* is a precedent decision and DHS officers rely on the case, there are unpublished decisions from the AAU that acknowledge the lifestyle of many of the U.S. citizens who possess few records and accept affidavits as evidence to prove presence. See, e.g., AAU decision of July 6, 2005 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

307. *In re Tijerina-Villareal*, 13 I&N Dec. 327, 331 (B.I.A. 1969).

ence in the United States from sources other than affidavits and testimony of the applicant's family and acquaintances.

For example, B.V. was already in removal proceedings and charged with deportability for a drug possession conviction when he sought to apply for a certificate of citizenship as the son of a parent who was a U.S. citizen under INA Section 301(g).<sup>308</sup> While B.V.'s father had worked in the United States from the time he was a teenager until his death, CIS denied B.V.'s application for certificate of citizenship. B.V.'s application included social security earnings records, pay stubs for work performed in the United States, and money order receipts that he sent from the United States to his family in Mexico. B.V.'s brother had also been in removal proceedings several years earlier. In that case, another immigration judge had found that B.V.'s father had accumulated ten years of presence before his brother's birth. B.V. included the transcript of his brother's hearing as evidence in his case. Finally, B.V.'s application also contained a number of detailed affidavits of family members attesting to the father's presence in the United States.<sup>309</sup>

Nevertheless, DHS denied B.V.'s application based on insufficient evidence of the father's presence.<sup>310</sup> The adjudicator counted only the work history recorded on B.V.'s father's social security earnings report and ignored evidence that the father had performed other work for which he was paid in cash.<sup>311</sup> DHS also determined that immigration petitions the father had filed for his family in which he recorded his *residence* in Mexico were conclusive that he was *physically present* in Mexico and not the United States. Furthermore, DHS determined that the affidavits and the immigration judge's findings in B.V.'s brother's case failed to prove Mr. V.'s father's required presence in the country.<sup>312</sup>

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308. File of B.V. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). DHS initiated proceedings and charged B.V. with deportability as an aggravated felony under INA § 237(a)(2)(iii), 8 U.S.C. § 1227(a)(2)(iii), for a felony conviction for illegal possession of a controlled substance. B.V. asserted a claim to citizenship and the immigration judge continued the removal proceedings to permit B.V. to apply for a certificate of citizenship. At that time DHS argued that a felony conviction involving possession of a controlled substance met the definition for an aggravated felony in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), drug trafficking offense. However, in *Lopez v. Gonzalez*, the Supreme Court ruled that a conviction that did not involve the sale or distribution of drugs was not an aggravated felony. *Lopez v. Gonzalez*, 549 U.S. 47, 54–55 (2006).

309. Case file on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

310. Denial on file with *The Scholar: St. Mary's Law Review on Minority Issues*. Following the rejection of his application for certificate of citizenship, B.V. presented his evidence, including the testimony of witnesses to his father's presence in the United States before the immigration judge. See *infra* Part V.C.

311. Case file on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

312. *Id.*

U.S.-citizen women have a greater burden of proving presence in the United States because their work history is not well documented. In another case, P.H. claimed citizenship under INA Section 301(g). His father and mother were born in Mexico, but his mother acquired U.S. citizenship from her mother who was born in the United States.<sup>313</sup> To establish his acquired citizenship, P.H. offered witnesses who attested to his mother's ten years of physical presence in the United States. She lived in Mexico near the U.S. border and maintained she traveled daily to the United States where she worked in housekeeping and child care. P.H.'s mother had no evidence of her work history in the United States other than the testimony of witnesses. DHS conducted an investigation and determined that P.H.'s family birth records and prior immigration petitions filed by his mother stated that she resided in Mexico. DHS concluded that records of P.H.'s mother's residence in Mexico outweighed any evidence contained in the testimony of witnesses.<sup>314</sup>

Thus, the applicant whose parent must rely on affidavits and testimonial evidence faces a heavy burden of proof. Some adjudicators are predisposed to distrust such evidence and others do not have the time to fully and carefully interview significant witnesses.<sup>315</sup> DHS relies solely on

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313. File of P.H. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

314. The case is still pending a motion to reopen the denial by DHS, in part arguing that DHS ignored key evidence and used the wrong standard for determining that the mother failed to meet conditions by which her son could acquire U.S. citizenship. DHS used the same evaluation of evidence in P.H.'s case that it did with regard to B.V.'s application. While the statute requires that the parent prove physical presence in the United States which permits consideration of time spent working in the United States, DHS determined that the mother's listing of Mexico as her residence in her family and immigration records was conclusive of the mother's presence in the United States.

Other cases also demonstrate difficulties women face in proving their presence in the United States. In the case of C.J., he was born out of wedlock to a U.S. citizen mother and claimed citizenship under INA § 309, which required evidence of one continuous year of presence. INA § 309(c); 8 U.S.C. § 1409(c) (2006). C.J.'s mother was born in the United States and raised in Mexico. She also traveled frequently to the United States with relatives to work although she never attended school and had no records of the farm labor she performed in the U.S. Her history of presence was based almost entirely on the testimony of her elderly aunt and her cousins. She also submitted employment records relating to her aunt and her cousin and one report of an arrest of the aunt by INS in which her presence was recorded as accompanying the aunt. DHS refused to issue a certificate of citizenship, but after an immigration judge who heard the testimony of the witnesses terminated the proceedings, DHS finally issued the certificate of citizenship. See case on file with author.

315. Many of the U.S. parents and their witnesses are elderly and infirm and presenting their testimonies is difficult and discouraging for both the applicant and the busy DHS adjudicator. The application for N.Q. was denied for insufficient evidence of her father's presence in the United States even though the father, born in 1926, had worked and lived in the United States for over thirty years before his daughter's birth in 1971. He was interviewed by the DHS adjudicator when he was 80 and almost deaf. The adjudicator

records which establish the family's residence in Mexico and refuses to acknowledge the U.S.-parent's lifestyle as a migratory worker in the United States. In the absence of substantial documentary evidence of employment in the United States, CIS is likely to find that the U.S. parent failed to meet the presence requirement of the statute.

#### B. *Citizenship Claims Before the Department of State*

In the United States, a citizenship claimant can apply for a U.S. passport under rules established by the DOS in conjunction with or as an alternative to the application for certificate of citizenship offered by DHS.<sup>316</sup> However, in practice acquired citizenship claimants find the same barriers when submitting a passport application as they find with DHS. The Passport Office is challenged by an enormous number of passport applications which it must adjudicate.<sup>317</sup> An application on behalf of an acquired citizen requires more attention and will not be adjudicated expeditiously.

Furthermore, the DOS favors state-issued and physician-assisted birth certificates to establish the parent's birth in the United States and documentary evidence to support the parent's U.S. presence.<sup>318</sup> Adjudications are delayed and often result in denials when applicants present as evidence delayed and mid-wife executed birth certificates and affidavits and testimonies. Moreover, evidence successfully submitted to DHS on behalf of acquired citizens has been rejected by DOS on behalf of siblings living abroad. An example is a daughter of J.Z. who lived in Mexico and sought to apply for recognition of her acquired citizenship status at a U.S. consulate. She used the same evidence which supported her siblings' ap-

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stated, "[i]t becomes difficult to get a straight answer from Mr. Q." N.Q. was placed in removal proceedings and then retained the St.Mary's Clinic. Law students discovered that N.Q.'s father read Spanish. They painstakingly prepared an affidavit based on the father's detailed responses to written questions. Notwithstanding, the DHS adjudicators have refused to interview the father by written questions. Case on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

316. See *supra* Part IV.B. The standard of proof is preponderance of the evidence, the same as with applications for certificates of citizenship. 22 C.F.R. § 51.40 (2010); Patel v. Rice, 403 F. Supp. 2d 560, 561 (N.D. Tex. 2005).

317. See *All Things Considered: Passport Backlog Blamed on New Requirements* (NPR radio broadcast Apr. 4, 2007), <http://www.npr.org/templates/story/story.php?storyId=9359805>. Since January 2007, new rules have taken effect requiring U.S. citizens to have passports for all plane travel between the United States, Mexico, Canada, and the Caribbean. *Id.* In the months following these changes, DOS handled more than one million passport applications per month, and the resulting backlog increased the wait time for a passport from eight weeks up to three months or more. *Id.*

318. See Email from Lisa Brodyaga, *supra* note 96; Interview with Nelly Vielma, Att'y, (Sept. 29, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).



proved applications for certificates of citizenship, but her requests were denied. Ultimately, J.Z.'s daughter obtained an immigrant visa, was admitted to the United States and eventually obtained her certificate of citizenship from DHS.<sup>319</sup>

On June 1, 2009 the Western Hemisphere Travel Initiative (WHTI) was implemented.<sup>320</sup> The statute requires that U.S. citizens carry a U.S. passport when departing from or entering the United States. A crisis in asserting claims to citizenship before the DOS occurred when the government began requiring that all U.S. citizens carry a passport.<sup>321</sup> Not only did the WHTI cause delays in obtaining passports, but many individuals who were born in the United States and acquired U.S. citizenship were unable to convince the DOS to grant their passport applications. Applications containing delayed and mid-wife executed birth certificates and scant documentary evidence of parent presence have often been denied.<sup>322</sup>

The regulations provide that a citizenship claimant who is outside the United States cannot apply for a certificate of citizenship and must resort to presenting a claim at a United States embassy or consulate.<sup>323</sup> Again, success in asserting a citizenship claim abroad depends on the amount and type of evidence submitted. Practitioners state that the DOS abroad is not likely to accept delayed and mid-wife birth certificates and affidavits and testimonies, causing many attorneys to prefer presenting their clients claims to acquired citizenship in the United States.<sup>324</sup>

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319. Case file of J.Z. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Advocates also report that consular officials often challenge the U.S. citizenship of individuals who appear at the consulates with mid-wife executed and delayed certificates of birth. Advocates complain that individuals who appear at consulates without counsel are pressured to sign statements admitting they procured their birth certificates by fraud. See BRODYAGA, *supra* note 96, at 4.

320. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007).

321. Melissa Del Bosque, *Locked Out*, TEXAS OBSERVER, May 12, 2010, <http://www.texasobserver.org/archives/item/16529-locked-out?tmpl=component&print=1>.

322. See Second Amended Petition For Writ Of Habeas Corpus, Constitutional Tort Claims, Bivens Action For Damages, And Class Action Complaint For Declaratory And Injunctive Relief at 22–23, *Castro v. Freeman*, Case 1:07-cv-00218 (S.D. Tex. May 3, 2010), available at <http://www.aila.org/content/default.aspx?docid=32410>; see also Valencia-Weber & Lopez, *supra* note 65, at 308–09 (discussing the impact of the WHTI on native peoples who live at or near the U.S.–Mexico border).

323. 8 C.F.R. § 301.1(a)(2) (2011).

324. See Email from Lisa S. Brodyaga, *supra* note 96; Interview with Nelly Vielma, *supra* note 318. See also Second Amended Petition For Writ Of Habeas Corpus, Constitutional Tort Claims, Bivens Action For Damages, And Class Action Complaint For Declaratory And Injunctive Relief at 18, *Castro v. Freeman*, Case 1:07-cv-00218 (S.D. Tex. May 3,

### C. *Citizenship Claims Ignored*

Certainly there are instances in which children of U.S. citizens learned of their claim to acquired citizenship from U.S. government officers. Those who applied on their own for certificates of citizenship or U.S. passports report they learned of the process when they or family members were petitioning for an immigration benefit at a U.S. consulate or an INS/DHS office. However, many individuals born abroad to a U.S. parent do not know they have a claim to acquired citizenship, and it is common that individuals who have had multiple contacts with officers of the INS/DHS or State Department, including those who have immigrated to the United States through a U.S.-citizen parent, are not notified of a possible claim to citizenship and did not learn of the right until they received advice from an attorney or legal representative.

DHS has made some improvements to provide notice of citizenship benefits. CIS has updated its website to provide more comprehensive information about immigration and citizenship. The website includes the N-600 form, instructions for preparing the form, and commonly asked questions about citizenship.<sup>325</sup> Furthermore, some CIS offices expedite the adjudication of applications for certificates of citizenship involving individuals who are detained by DHS or in removal proceedings.<sup>326</sup> But, the legacy INS and DHS have never established a program within the agency with the task of notifying and locating acquired citizens.<sup>327</sup> In

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2010), available at <http://www.aila.org/content/default.aspx?docid=32410> (alleging that the DOS refuses to accept affidavit evidence to support passport applications).

325. *Citizenship Through Parents*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis> (select “Citizenship Through Parents”) (last updated June 3, 2011). However, the information provided is only in English. See generally *id.*

326. Email from Albert W. Blakeway, *supra* note 44. See also case of P.H. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (indicating that the CIS officer traveled to interview witnesses who were unable to appear at the CIS office). See also Interview with Irma Whiteley, Investigator for the Fed. Pub. Defender’s Office in El Paso, Tex. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (N-600s on behalf of detained individuals are expedited); Interview with Maria Rangel, Investigator for Fed. Pub. Defender’s Office in McAllen, Tex. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (indicating that N-600 adjudications take a least a year and defendants charged under immigration-related criminal offenses remained detained).

327. While DHS has the capability to locate some citizens, it has failed to do so, a problem that often affects derivative citizens. A child automatically becomes a U.S. citizen if, while under the age of 18, he or she is admitted as a legal resident, and resides in the custody of a U.S. citizen parent. While key information is located in the DHS files relating to the legal resident child and the naturalized parent, DHS databases have not been updated to reflect the change in the child’s status. Margaret Stock, *Citizenship and Computers*, 15 BENDER’S IMMIGR. BULL. 1143 (2010); see KOHLI ET AL., *supra* note 3, at 4 (reporting the failure of DHS to update its databases with naturalization data and the detention of U.S. citizen children of naturalized parents).

contrast, the agency has made significant efforts to assist other individuals seeking citizenship benefits, in particular with naturalization applicants. CIS offices have established programs in communities targeted to inform and guide legal residents who aspire to become naturalized citizens.<sup>328</sup>

The lack of prioritization is starkly evident in DHS enforcement where the agency concern is for unauthorized immigration, crime, and national security,<sup>329</sup> and DHS enforcement officers frequently ignore potential citizen claimants. There are no requirements that DHS officers provide notice of the provisions for citizenship under U.S. nationality law to individuals who have a U.S. parent and who are encountered by officers during enforcement operations.<sup>330</sup> DHS officers ignore even obvious citizenship issues that arise during enforcement.<sup>331</sup>

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328. See Memorandum on Naturalization, 32 WEEKLY COMP. PRES. DOC. 1495 (Aug. 22, 1996) as cited in Note, *Administrative Denaturalization: Is There "Nothing You Can Do that Can't Be [Un]done,"* 34 LOYOLA OF L.A. L. REV. 895, n.5 (2001) President Clinton announced Citizenship USA in 1996, a program to naturalize one million new citizens and the program led to 1,049,867 naturalized citizens. *Id.* at 907. CIS has also made significant and admirable efforts to reach out to legal residents who are serving in the armed forces. See Amy Kirk, *Eisenhower Kicks Off Naturalization Campaign* (Apr. 19, 2010), NAVY.MIL, [http://www.navy.mil/search/display.asp?story\\_id=52714](http://www.navy.mil/search/display.asp?story_id=52714) (reporting about a program that allows servicemen to more easily apply for citizenship). In fact, the "National Defense Authorization Act for Fiscal Year 2004" extended all aspects of the naturalization process, including naturalization applications, interviews, oaths, and ceremonies to members of the U.S. armed forces serving overseas. Before October 1, 2004, military service members could only naturalize while physically within the United States. Since September 2001, USCIS has naturalized over 65,000 service men and women. Anthony Marshall, U.S. Dep't of Homeland Sec. Senior Immigration Services Officer of San Antonio, TX, Address at St. Mary's University School of Law & *The Scholar: St. Mary's Law Review on Minority Issues* Symposium: Immigration Law: Practice and Policy in the Twenty-first Century (Mar. 2012) (source on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (quoting text from slide five of Marshall's presentation).

329. See ROSENBLUM, *supra* note 38, at 12–15 (discussing the change in immigration policies since 9/11); Chacon, *supra* note 56, at 1856–57 (reporting on the number of foreign nationals detained by DHS in the name of national security); Miller, *supra* note 82, at 615 (discussing immigration in terms of national security).

330. See, e.g., Memorandum from John Morton, Asst. Sec. U.S. Immigration and Customs Enforcement to Field Office Directors, Superseding Guidance on Reporting and Investigating Claims to United States Citizenship (Nov. 19, 2009), available at [www.ice.gov/doclib/detention-reform/pdf/usc\\_guidance\\_nov\\_2009.pdf](http://www.ice.gov/doclib/detention-reform/pdf/usc_guidance_nov_2009.pdf) (directing officials to prioritize investigations into U.S. citizenship).

331. For instance, cases in which the individual arrested reported to DHS that both parents are U.S. citizens. See case of J.L. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Mr. L was born in Mexico to two U.S. citizens and acquired citizenship under INA § 301(c), but notwithstanding that he informed several INS and DHS officers that both his parents were U.S. citizens, he was removed multiple times. See also *infra* note 405.

For example, law students interviewed C.J. when he had just completed a sentence of 120 days for falsely claiming to be a U.S. citizen. C.J. was a legal resident who immigrated through a U.S.-citizen mother, lived with her and his naturalized U.S.-citizen father, but did not know that he might have a claim to acquisition to U.S. citizenship. At the time of his arrest he was returning to the U.S. from a trip to Mexico but had lost his permanent resident card. At the border, he was detained after he told the inspector that he was a U.S. citizen. The INS inspector asked him a series of questions, including the citizenship of his parents. C.J. responded that both his parents were U.S. citizens. At that point it should have been clear to any trained immigration inspector that C.J. could actually be a U.S. citizen through one or both parents. Not only did the officer fail to notify C.J. of the possibility he could be a citizen, but he recommended to the U.S. Attorney that C.J. be prosecuted for making a “false claim to citizenship.” C.J. was convicted of the offense and after completion of his criminal sentence, C.J., through his attorneys, asserted his citizenship claim before an immigration judge and eventually was granted a certificate of citizenship.<sup>332</sup>

DHS enforcement officers have the resources and ability to determine at least *prima facie* eligibility for acquired citizenship status. All DHS officers receive training in immigration and nationality law and presumably understand that individuals born abroad to a U.S. parent may have a claim to citizenship. Forms used by DHS enforcement officers during an arrest of a suspected non-citizen, particularly the form I-213, request information concerning the citizenship of parents.<sup>333</sup> Many individuals who are arrested by DHS officers have an administrative file which contains information about the parents and is accessible to all DHS officers.<sup>334</sup>

Each year DHS removes hundreds of thousands of individuals following a removal order<sup>335</sup> or pursuant to a voluntary departure which per-

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332. Case file of C.J. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Ultimately, C.J. acquired citizenship through his mother because C.J. was born out of wedlock and the mother established she had been physically present in the United States at least one year before C.J.'s birth. This situation is governed by INA § 309, 8 U.S.C. § 1409 (2006).

333. DHS officers prepare a form I-213, Record of Deportable Alien, for every individual arrested. The form contains data concerning the individual, including date of birth, place of birth and the names and birth places of the individual's parents. See *In re Mejia*, 16 I&N Dec. 6 (B.I.A. 1976) (discussing Form I-213, and its role in processing individuals in immigration arrest, detention, and proceedings).

334. See *United States v. Smith-Baltiher*, 424 F.3d 913, 916 n.3 (9th Cir. 2005) (noting that the “A-File” provides biographic data and contains all records and documents related to the individual).

335. See 2010 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 5, at 94 (detailing the total number of individuals removed by fiscal year). The total number of individuals

mits non-citizens to depart the United States and avoid a removal order.<sup>336</sup> Despite the discovery that U.S. citizens are among individuals detained and even removed by DHS, the agency has established no screening process and no policy directive which would guarantee that individuals with a potential claim to citizenship are discovered and their removal from the United States stayed.<sup>337</sup> In 2009, John Morton, Assistant Secretary for ICE, issued a memorandum instructing DHS officers to investigate and report claims to citizenship which arise during enforcement duties.<sup>338</sup> However, the memorandum provides no requirement

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removed pursuant to orders by immigration judges (INA § 240(a)) or expedited and reinstated orders of removal executed by DHS officers (INA §§ 235(b), 238, 241(a)(5)) for the ten year period, 2000-2010, is 2,983,413. *Id.* (identifying the following statistics regarding removals [FY Year: # individuals removed that year]: 2000:188,467; 2001: 189,026; 2002: 165,168; 2003: 211,098; 2004: 240,665; 2005: 246,431; 2006: 280,974; 2007: 319,382; 2008: 359,795; 2009: 395,165; 2010: 387,242).

336. “The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense . . . in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings.” INA § 240B(a)(1), 8 U.S.C. § 1229c (2000). During the ten year period, 2000-2010, DHS voluntarily returned a total of 11,054,756 individuals, and the majority was from Mexico. *See* 2010 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 5, at 94–95 (identifying the following statistics regarding removals [FY Year: # individuals voluntarily returned that year]: 2000:1,675,876; 2001:1,349,371; 2002:1,012,116; 2003:945,294; 2004:1,166,576; 2005:1,096,920; 2006:1,043,381; 2007:891,390; 2008: 811,263; 2009:586,164; 2010:476,405).

337. The government has launched several programs for screening criminals for potential immigration violations: the Criminal Alien Program (CAP), the 287(g) Program, and the Secure Communities Program. ROSENBLUM & BRICK, *supra* note 39 at 1. Each of these three programs could initiate policies to screen for possible acquired citizenship and therefore prevent individuals with a valid claim to U.S. citizenship from being detained and/or removed. *See id.* (explaining each program and government efforts to increase enforcement against criminal aliens).

338. Memorandum from John Morton, *supra* note 330. The memo was meant to “ensure claims to U.S. citizenship received immediate and careful investigation and analysis.” *Id.* at 1. The memo states that field officers must investigate when they encounter an individual who asserts a citizenship claim, but does not establish a screening process for locating citizens and concrete, department-wide procedures when officers encounter individuals who have a U.S. parent. *Id.* The Morton Memorandum follows a similar directive that was issued on Nov. 6, 2008 by ICE Director James T. Hayes, Jr. and instructed ICE officers to investigate and report individuals encountered who “either assert claim to U.S. citizenship or are unsure of their citizenship.” Jacqueline Stevens, *Newly Released ICE Memorandum Admits US Citizens in ICE Custody*, STATES WITHOUT NATIONS BLOG (Oct. 26, 2009), <http://stateswithoutnations.blogspot.com/2009/10/on-november-6-2008-james-hayes-jr.html> (detailing the contents of Hayes memorandum) (proving “superseding guidance on reporting and investigating crimes to United States Citizenship”). Unlike the Morton memo, the Hayes memo did not mandate a 24-hour reporting deadline. *Id.* Notwithstanding, compliance with the 24-hour rule is questioned. *See* Stevens, *supra* note 8, at 633–34 (finding evidence through emails that the 24-hour rule was not followed). While the Morton Memo increased protections to prevent detention and removal of known U.S. citizens, it also em-

that DHS officers affirmatively advise individuals in custody of the terms and procedures for asserting citizenship.<sup>339</sup> Furthermore, any benefit of the Morton Memorandum to a potential acquired citizen comes only after the individual satisfies DHS that a valid claim exists.<sup>340</sup>

## V. ASSERTING CLAIMS BEFORE THE IMMIGRATION COURT

For an individual who is fortunate to learn of a possible claim to acquired U.S. citizenship prior to removal, immigration court provides an additional avenue for asserting a claim and for resolution of disputed facts and legal issues. Notwithstanding, immigration court regulations

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phasizes to enforcement officers the need to document false claims to citizenship. Memorandum from John Morton, *supra* note 330. The memo includes requirements that officers work with local U.S. Attorneys “to ensure that any statement includes information sufficient to use in prosecuting appropriate cases under 18 USC § 911” for false claims to citizenship. *Id.* at 3.

339. See Memorandum from John Morton, *supra* note 330 (providing only direction on how to properly investigate claims).

340. See *id.* (directing officials not to arrest anyone who has provided evidence that they are a U.S. citizen). The Morton Memo has served to prevent the removal of some citizenship claimants, and in an effort to prevent the detention of U.S. citizens, DHS launched a toll free hotline for detained individuals who believe they are U.S. citizens. See News Release, ICE Establishes Hotline for Detained Individuals, Issues New Detainer Form (Dec. 29, 2011) (available at <http://www.ice.gov/news/releases/1112/111229washingtondc.htm>). However, a toll free hotline can only benefit individuals who know they are citizens, and DHS continues to detain individuals even after receiving substantial evidence of citizenship. The memo states that individuals should not be detained if there is “probative evidence” of U.S. citizenship and “if the evidence of U.S. citizenship outweighs evidence to the contrary.” *Id.* at 1. DHS demands conclusive evidence of citizenship in cases of individuals claiming acquired citizenship. For instance, J.L. was born in Mexico to two U.S. parents and had been removed from the U.S. multiple times prior to his arrest by DHS in March 2009. See *infra* note 405. A DHS officer finally investigated his claim, but even with the birth certificates of both parents and evidence that they married, J.L. remained in custody for three months until an immigration judge terminated proceedings. Case on file with *The Scholar: St. Mary’s Law Review on Minority Issues*. In the case of M.J. who was arrested by DHS in 2010, DHS refused to agree to his release from detention even though his older brother’s removal case had been terminated upon evidence that the father was born in the U.S. and had been physically present ten years prior to the brother’s birth. Case on file with *The Scholar: St. Mary’s Law Review on Minority Issues*. The law students representing M.J. requested a bond hearing and the immigration judge ordered the release of M.J. Furthermore, the Morton Memo does not instruct DHS officers to cancel reinstatement of removal orders relating to individuals who have been removed and subsequently discovered to have citizenship claims. See Memorandum from John Morton, *supra* note 330, at 1. Consequently, although citizenship claims have been asserted, the claimants remain in detention and subject to reinstatement of prior orders. See *id.* Reinstatement of removal orders deprive individuals of a hearing before an immigration judge, prevent motions to reopen the prior order of removal, and provide very limited access to judicial review. See *infra* Part VI.A. Acquired-citizen claimants who are unable to conclusively prove their citizenship continue to be removed under reinstatement orders. *Id.*

compound the general lack of notice and fail to require that immigration judges inform all individuals of the terms and procedures by which a child born abroad to a U.S. citizen can acquire citizenship.<sup>341</sup> With no guaranteed access to legal representation, individuals who are unaware of possible claims can be ordered removed from the United States. In the midst of an already flawed system for hearing claims to citizenship, Congress ushered in major changes in immigration law in 1996, first in AEDPA<sup>342</sup> and a few months later, in IIRIRA,<sup>343</sup> and dramatic increases in enforcement against noncitizens exposed more individuals who have a U.S. parent and potential claim to U.S. citizenship to detention and removal.

#### A. *Citizenship Claims in Removal Proceedings*

Immigration court provides a trial-like setting appropriate to hear citizenship claims and there have been successful outcomes for children of U.S. citizens, including many whose applications for certificates of citizenship and U.S. passports have failed before the DHS and DOS. The immigration judge will consider and evaluate all the evidence, including testimony of witnesses, and resolve questions of fact and law concerning the birth and presence of the parent.<sup>344</sup>

Hearings before an immigration judge provided B.V. with the opportunity to fully present his claim to citizenship and to establish his father's required physical presence. The judge heard the witness testimony which corroborated the evidence that B.V.'s father had lived and worked in the United States most of his life and ultimately, discounted the incomplete and unfair DHS position that B.V.'s father resided in Mexico and only occasionally came to the United States to work.<sup>345</sup>

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341. See *infra* Section V. A.

342. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

343. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009.

344. Immigration judges are all lawyers and "their only responsibility is adjudication. They conduct relatively formal, evidentiary, adversarial hearings." Legomsky, *supra* note 218, at 1305.

345. Initially, the immigration judge in B.V.'s case terminated the proceeding based on *res judicata* and collateral estoppel. The judge relied on the findings of the immigration judge who determined in B.V.'s brother's case that the U.S.-citizen father met the ten years of physical presence requirements of INA § 301(g), 8 U.S.C. § 1401(g). The DHS appealed to the BIA, which ruled that *res judicata* and collateral estoppel principles apply only to B.V.'s brother and not to B.V. On remand, the judge re-determined the physical presence issue, found that B.V. was likely a U.S. citizen, and terminated the proceeding. The BIA decision in B.V.'s case conflicted with an earlier AAU decision, *In re J.D.-G.* (AAU 1985) in which evidence that established the older brother's acquired citizenship was held determinative in the younger brother's case. Case on file with *The Scholar: St. Mary's Law Review on Minority Issues*. See also ENDELMAN, *supra* note 209, at 5.

In a similar case, S.R. asserted his claim to U.S. citizenship before an immigration judge. The N-600 application that S.R.'s father had submitted when his son was a child had been denied in 1977 by legacy INS for insufficient evidence of the father's physical presence. Thereafter, S.R. was removed multiple times by INS officers before he asserted his claim before an immigration judge in 1993.<sup>346</sup> S.R.'s father was born in 1928 and testified that he had worked continuously in the United States in farm and ranch labor. Several of the father's siblings gave vivid and detailed testimony of the father's presence in the United States. The judge found that S.R. was likely a U.S. citizen and terminated the proceedings.

In both cases the claimant presented substantially the same evidence in the earlier N-600 applications for certificate of citizenship and in immigration court.<sup>347</sup> In both cases, after the immigration judges' orders terminating removal proceedings, DHS granted motions to reopen and issued certificates of citizenship to both B.V. and S.R.<sup>348</sup>

Notwithstanding the ability to successfully assert a claim to citizenship in a removal proceeding as a defense to removal and the advantage to doing so in some cases involving complex factual and legal issues, there is no guarantee that a respondent in removal proceedings will be fully advised of the rules for obtaining U.S. citizenship. The first allegation of facts in the Notice to Appear, which is served on the respondent by DHS and filed with the immigration court, charges that the respondent is not a citizen of the United States and signifies that removal proceedings may not proceed against a U.S. citizen. The immigration judge is not required

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346. In one arrest by the Border Patrol on December 14, 1986, S.R. attempted to assert his claim for citizenship. The Border Patrol agent noted on the form I-213 that he spoke to the father and agreed that S.R. was likely a U.S. citizen. But, the next day on December 15, 1986 the agent amended his notes to state that "subject was determined to be an illegal alien." S.R. was deported following the arrest. I-213 relating to S.R. on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

347. The N-600 application for S.R. was prepared by a well-known immigration attorney, Sarah Reinhardt, when she was a law student working in a summer program for a non-profit legal project for migrant farm workers in the Midwest. The application meticulously documented S.R.'s father's presence in the United States and included a very detailed affidavit from the father. S.R. and his family moved from the area to South Texas and lost contact with their attorneys. Legacy INS denied the N-600, but in 1993 when S.R. presented his claim to the immigration judge, he submitted the same evidence previously filed with the N-600, and S.R.'s father testified consistent with his earlier statement.

348. While these cases demonstrate that acquired citizenship disputes can be settled in immigration court, there is no guarantee that DHS will issue a certificate of citizenship after an immigration judge orders a termination of proceedings. The agency may remain at odds with the judge's findings. In some cases the citizenship claim is left unresolved. See *Rios-Valenzuela v. DHS*, 506 F.3d 393 (5th Cir. 2007) (dismissing the case for lack of subject matter jurisdiction); *Ortega v. Holder*, 592 F.3d 738 (7th Cir. 2010) (remanding the case to the lower court for further proceedings).



to provide any additional specific information about citizenship to ensure that the respondent fully understands the law and a respondent who is unaware of the terms by which an individual born abroad can acquire citizenship will likely answer the question in the negative.

Individuals in removal proceedings generally appear before an immigration judge who is present in the courtroom or by televideo linked to a courtroom located at a detention site. The regulations mandate that immigration judges notify individuals in removal proceedings of certain rights such as to obtain counsel, to present evidence and to appeal,<sup>349</sup> and furthermore, requires notice of any “apparent eligibility to apply for any of the benefits.”<sup>350</sup> Arguably if an immigration judge learns that an individual in removal proceedings has a U.S. parent, his or her status as an acquired citizenship would be apparent and trigger notice of the requirements for acquired citizenship under U.S. law. EOIR publishes an Immigration Court Bench Book which provides a checklist of questions for use by immigration judges when addressing unrepresented individuals, and the list includes the question, “[w]ere your parents or grandparents ever United States citizens.”<sup>351</sup> However, not all immigration judges use the suggested checklist,<sup>352</sup> and the statute and the regulations do not mandate that an immigration judge inquire as to the respondent’s parents nor explain acquisition of citizenship under U.S. law.<sup>353</sup> Furthermore, there

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349. 8 C.F.R. § 1240.10 (2010); *Picca v. Mukasey*, 512 F.3d 75, 78 (2d Cir. 2008); *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1085 (9th Cir. 1996).

350. 8 C.F.R. § 1240.11(a)(2). *See United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1054 (9th Cir. 2003) (stating that petitioner argued that his due process rights were violated when he wasn’t informed of his right to petition for relief under the appropriate section of the INA).

351. *EOIR Immigration Court Bench Book*, *supra* note 25.

352. Interview with Judge Howard Van Winkle, Former Immigration Judge (Sept. 30, 2011). A survey of six immigration judges in the San Antonio immigration court in 2011 revealed that the judges have not consistently asked detained and unrepresented individuals if they had a U.S. citizen parent or grandparent. *Id.* Retired Judge Howard Van Winkle states that the EOIR guidelines are recent and that in his experience most judges have not on a regular basis asked detainees if they have a parent or grandparent who is a U.S. citizen. *Id.* Furthermore, EOIR does not monitor immigration judges to determine whether they do inquire about parental citizenship when addressing unrepresented individuals. Interview with Marion Hicks, EOIR Court Adm’r (Oct. 5, 2011).

353. I argue that at a minimum the immigration judge should follow the EOIR guidelines and ask all unrepresented individuals whether they have a parent or grandparent who is a U.S. citizen. However, as any practitioner of immigration and nationality law knows, there are several questions that must be asked at an initial interview, and it would seem more appropriate for EOIR to provide for every respondent in removal proceedings more in-depth information about U.S. citizenship law. Robert Mautino advises, “[y]our first questions to all prospective immigration clients should be along these lines: (1) Where were you born? (2) Where were your parents, grandparents and great-grandparents born? (3) To your knowledge, do you have any direct-line ancestors who were born in the

are many instances when the respondent in removal proceedings does not appear before an immigration judge, either in person or by televideo.<sup>354</sup> The regulations permit an immigration judge to enter a stipulated removal order in which the respondent waives his right to a hearing.<sup>355</sup> While the immigration judge is required to determine that the waiver of a hearing by an unrepresented individual is “voluntary, knowing and intelligent,”<sup>356</sup> the stipulated order fails to provide any information about acquired citizenship.

### B. Increased Enforcement

Congress ushered in changes to immigration law enforcement which led to dramatic increases in the detention and removal of purported deportable non-citizens.<sup>357</sup> While immigration law has consistently imposed consequences to non-citizens who commit or are convicted of crimes,<sup>358</sup>

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[United States], naturalized in the [United States] or lived for several years or more in the [United States]? (4) Please answer the same questions regarding your spouse. (5) Did you or your spouse ever perform U.S. military service?” 90 IMMIGRATION BRIEFING 2 (Apr. 1990). See BALDINI-POTERMIN, *supra* note 225, at § 5:12 (listing two pages of questions that a practitioner should ask a client to assess nationality and citizenship).

354. For example, individuals detained at the DHS contract-detention facilities in Laredo and Pearsall, hearings are held via televideo, with the judge presiding at the courthouse in San Antonio, Texas. *About the Court*, IMMIGR. COURT–SAN ANTONIO, TEXAS, <http://www.justice.gov/eoir/sibpages/sna/about.htm> (last visited Jan. 23, 2012).

355. 8 C.F.R. § 1003.25(b) (2010). Professor Jill E. Family soundly criticizes this and other means of removal as a diversion from the immigration adjudication system and a violation of sound administrative law practices. Family, *supra* note 23, at 598.

356. 8 C.F.R. § 1003.25(b).

357. Nora Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1061–63 (2002).

358. Early immigration laws provided sanctions for criminals; for example, the Act of 1875 established exclusion grounds based on prostitution and convictions. DAN KESSEL-BRENNER & LORY ROSENBERG, *IMMIGRATION LAW AND CRIMES* (West 2011). Long-established crime-based grounds of inadmissibility and deportability include crimes of moral turpitude, INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) and INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i); controlled substances offenses, INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) and INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i); and weapons crimes, INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). In 1988, Congress, in a push to expand enforcement against drug trafficking, enacted the Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988), and established a new ground of deportability for aggravated felonies, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). As defined originally, the term aggravated felony meant convictions for and any attempts and conspiracies to commit “murder, any drug trafficking crime as defined in section 924(c)(2) of title 18 . . . or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title . . .” INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988). See Demleitner, *supra* note 357, at 1065–66 (explaining the development of the term “aggravated felonies”). Congress then made incremental changes which expanded the definition of aggravated felonies in IMMACT 1990, Pub. L. No. 101-649, 104

AEDPA and IIRIRA significantly changed the law by expanding the nature and scope of crime-based grounds of inadmissibility and deportability and mandating detention for a large number of non-citizens convicted of crimes.<sup>359</sup> The 1996 legislation further diminished or eliminated forms of relief which had traditionally been available to non-citizens deportable for crimes.<sup>360</sup> To increase apprehension of non-citizens illegally in the United States but deportable for crimes, the legislation

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Stat. 4978 (adding crimes of violence to the definition) and in Immigration & Technical Correction Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (adding conviction for theft and burglary). See generally KESSELBRENNER & ROSENBERG, *supra*; IRA KURZBAN, PRACTISING LAW INST., CRIMINALIZING IMMIGRATION LAW 325 (Oct. 13-14, 2009) (reflecting on the current paradigm of criminalizing civil conduct in immigration law).

359. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 435, 440, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, §§ 305, 321-322, 344, 347, 350, 110 Stat. 3009; KESSELBRENNER & ROSENBERG, *supra* note 358; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000); KURZBAN, *supra* note 358, at 325 (identifying that under the 1996 legislation, "Congress radically altered how lawful permanent residents and non-residents would be treated upon the commission or conviction of an aggravated felony").

360. The most notable waiver for crime-based grounds of inadmissibility was found under former INA § 212(c), 8 U.S.C. § 1182(c), a provision which allowed the immigration judge to consider and balance the equities involving long term immigrants and their families, and determine as a matter of discretion whether the individual should be deported. Former INA § 212(c) was part of the 1917 Proviso and authorized discretionary relief to individuals charged with offenses covered in the grounds of inadmissibility. See *In re Hernandez-Casillas*, 20 I&N Dec. 262, 262 (B.I.A. 1990), *aff'd*, 983 F.2d. 231 (5th Cir. 1993) (concluding that § 212(c) does not provide a ground of exclusion and therefore, once a lawful permanent resident is found to be deportable for entry without inspection they are ineligible for a waiver under that section); *In re Marin*, 16 I&N 581, 581 (B.I.A. 1978) (explaining that it is necessary to balance "the adverse factors of record evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf" when determining whether to grant relief). INA § 212(c) remained virtually intact until 1990 when Congress barred relief for those aggravated felons who actually served a five-year prison term. See *In re Ramirez-Somera*, 20 I&N Dec. 564, 564-65 (B.I.A. 1992) (denying the opportunity for a § 212(c) waiver because respondent had been convicted of two aggravated felonies and served a term of imprisonment for at least five years). AEDPA barred access to § 212(c) relief to most non-citizens charged under crime-based grounds. AEDPA §§ 435, 440. IIRIRA repealed the statute altogether and replaced it with a new form of relief, cancellation of removal under INA § 240A(a). IIRIRA § 304(a)(3) (inserting a new section entitled "Cancellation of Removal for Certain Permanent Residents"). However, cancellation of removal is unavailable to non-citizens who have been convicted of an aggravated felony and also includes strict residence requirements that further narrow relief. See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 556-57 (2011) ("Once a deportability ground attaches . . . there is a narrow avenue of potential relief from deportation. The narrowness of this relief also exhibits the harshness and complexity of immigration law.").

authorized substantial funding for enforcement.<sup>361</sup> Furthermore, the government launched cooperative programs with local law enforcement authorities.<sup>362</sup>

The level of enforcement officers rose to an unprecedented 17,057 agents as of 2010.<sup>363</sup> Since 1996, detention of deportable individuals has mushroomed, and in 2010 DHS detained 363,000 individuals.<sup>364</sup> Not surprisingly, immigration courts have experienced extraordinary increases in their caseloads.<sup>365</sup> Between 2006 and 2010, the cases filed in immigration court increased from 351,051 to 392,888.<sup>366</sup> Individual immigration judges may carry caseloads in excess of 1,000 cases, and most cases involved detained individuals.<sup>367</sup> Furthermore, a crisis developed in legal representation as the number of unrepresented individuals in removal

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361. IIRIRA § 385 (authorizing appropriations of \$150 million in order to fund the new provisions relating to the removal of aliens).

362. See KOHLI ET AL., *supra* note 3, at 1 (introducing the Secure Communities program that helps to mobilize law enforcement resources on the local level to enforce federal immigration laws). The 287(g) and Secure Community programs gave DHS access to “every individual booked into a local county jail, usually while still in pre-trial custody.” *Id.* Congress allocated \$200 million each year in 2009 and 2010 to fund the Secure Community program. *Id.* at 3.

363. Angie Drobnic Holan, *U.S. has more border patrol agents on the border with Mexico than ever, but debate goes on*, ST. PETERSBURG TIMES (Fla.), July 2, 2010, 2010 WLNR 13457481 (identifying the massive increase in the number of agents; there were only 6,315 agents in 1997).

364. IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 7, at 1; see Family, *supra* note 360, at 560 (explaining that DHS continued to set detention records year after year).

365. The increase in cases has led to widespread concern among federal judges as to the quality of decisions made by immigration judges. See *Figueroa v. Mukasey*, 543 F.3d 487, 490 (9th Cir. 2008) (holding that the Immigration Judge applied incorrect standards when making his decision). Commensurate with the increases in cases filed in immigration courts was a streamlining of the appellate body, the Board of Immigration Appeals. Federal courts have also been critical of the streamlining procedures sanctioned by the Board. See *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (explaining that the adjudication of these cases by the Board “has fallen below the minimum standards of legal justice”).

366. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEARBOOK A1, available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf> [hereinafter DEP’T OF JUSTICE YEARBOOK]. The number of cases for 2011 is expected to rise to 400,000. *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Court*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited Feb. 18, 2012).

367. Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 624 (2009); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 545 (2009).

proceedings grew.<sup>368</sup> With no guaranteed legal assistance, detained individuals in removal proceedings faced an exceedingly complicated law, immigration courts taxed with a high volume of cases, and a formidable DHS.<sup>369</sup>

The number of immigration lawyers in the United States has steadily increased, but there are not enough lawyers who are dedicated to providing assistance to individuals who are detained and facing removal.<sup>370</sup> The detention facilities used by DHS are frequently located in areas where there are few if any immigration attorneys or public interest organizations able to provide immigration assistance.<sup>371</sup> Public interest organizations which provide legal services to indigents are understaffed and experience the never ending challenge of obtaining adequate funding.<sup>372</sup>

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368. See DEP'T OF JUSTICE YEARBOOK, *supra* note 366, at G1 (illustrating that in 2010 fifty-seven percent of cases completed in immigration court involved unrepresented individuals); see also Brennan, *supra* note 367, at 626 ("This means that the detainee must manage the acquisition of documents and identification of witnesses from behind bars . . . . All this puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record is fully developed."); Markowitz, *supra* note 367, at 542 (reporting that from 2002 until 2007, over 800,000 individuals facing removal were unrepresented by counsel).

369. See Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 464 (2009) (stating that "[t]he government will be on the other side with its awesome power, extensive institutional experience, and sophisticated understanding of the law").

370. Securing legal representation for detained individuals is by no means a new problem. Professor Margaret Taylor discussed the issue in her 1997 article when the detainee population was significantly less than it is today. Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1663-64 (1997) (identifying that INS has the capacity to detain 12,000 detainees and ninety percent are not represented). See also Michael Churgin, *An Essay on Legal Representation of Non-Citizens in Detention*, 5 INTERCULTURAL HUM. RTS. L. REV. 167, 173 (2009) (explaining that obtaining counsel is often "like the proverbial search for a needle in a haystack"). The number of members of the American Immigration Lawyers Association (AILA) has increased from 6,858 in 2000 to 11,343 in 2010. AILA membership statistics on file with *The Scholar: St. Mary's Law Review on Minority Issues*. However, many private immigration lawyers do not accept removal cases, particularly for detained individuals, because of the complexity and the cost. See Markowitz, *supra* note 367, at 549 ("[p]rivate attorneys are hesitant to take on the hardest, most time-consuming cases[—]deportation defense cases[—]since . . . those clients are most likely to default on their financial obligations.").

371. Benson, *supra* note 270, at 54-55.

372. See Markowitz, *supra* note 367, at 549 (explaining that a major problem with non-profit organizations is lack of funding). An important source of legal services to the poor, the Legal Services Corporation (LSC), is restricted from providing comprehensive legal services to many immigrant groups and also faces funding shortages. Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2188-89 (1999). And, even while U.S. citizens are eligible for LSC funded services, many legal services programs no longer provide immigration and citizenship services because of

Pro bono representation is very limited, particularly for individuals targeted under the new laws. Immigration and nationality law is viewed by lawyers to be so complex and harsh that few want to volunteer to help even the most deserving individuals.<sup>373</sup> Lawyers who agree to provide pro bono representation generally do not favor accepting those cases involving individuals who are detained and have criminal convictions,<sup>374</sup> and prefer instead to represent asylees and victims of crime.<sup>375</sup>

### C. Removal of Citizens

The unprecedented level of enforcement contributed to a greater number of U.S. citizens subject to detention and removal proceedings. The immigration courts do not track the cases in which ultimately the removal proceedings were terminated based on claims to acquired U.S. citizenship.<sup>376</sup> Similarly, the DHS does not record the number of applications for certificates of citizenship adjudicated for individuals in DHS custody

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the restrictions, lack of funds, and insufficient staff. See Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 657–58 (2011) (indicating the difficulty that individuals who need immigration assistance face if they cannot afford representation). Law school clinics, such as the immigration clinics at St. Mary's University School of Law, the University of Texas Law School, and the University of Houston School of Law, provide legal services to individuals in removal proceedings in a setting that is appropriate for law students' training in practical skills. See generally Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1 (2006) (assessing the need for developing interviewing skills in law school); Carol Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L. J. 235 (2007) (discussing significance of interviewing techniques which can be acquired in clinic immigration cases). However, law school clinics and other public interest organizations that provide much needed legal services, are not able to meet the demands of a growing population of detained individuals. Churgin, *supra* note 370, at 175–76.

373. See Family, *supra* note 360, at 542 (describing immigration law is “an insulated realm practiced by too few”).

374. See Chacon, *supra* note 56, at 1856 (explaining the difference in classification of “criminal aliens” and those who are simply classified as “non-citizens”); Family, *supra* note 360, at 569 (“The government’s efforts to brand the removal process as a tool to protect Americans from crime and national security threats may cause some attorneys to think twice before engaging in representation.”); Markowitz, *supra* note 367, at 561 (explaining that it is often difficult to even determine what cases are appropriate for representation). DHS also contributes to a culture where only the “deserving alien” should receive free legal services. On a few occasions DHS trial attorneys have voiced their opposition to some of the cases the St. Mary's University Immigration & Human Rights clinic has accepted. In one, the trial attorney asked the supervising attorney why the clinic was wasting its resources on representing a criminal alien. That individual, who had immigrated through his U.S.-citizen father, was a U.S. citizen.

375. Colyer et al., *supra* note 369, at 470.

376. Interview with Marion Hicks, *supra* note 352.

or subject to removal and reinstatement proceedings.<sup>377</sup> However, immigration attorneys who regularly appear in removal proceedings and the public interest organizations that assist indigent populations have encountered individuals who have valid claims to acquired citizenship.<sup>378</sup> Many have successfully asserted their claims.

Attorneys providing representation to individuals charged under immigration related criminal statutes, such as illegal entry under INA Section 275 and illegal reentry after removal under INA Section 276, have also discovered U.S. citizens amongst these individuals.<sup>379</sup> Immigration authorities have frequently combined civil proceeding for removal with prosecution and sentencing under immigration-related criminal statutes.<sup>380</sup> Although individuals in removal proceedings may be unrepre-

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377. Email from Albert W. Blakeway, *supra* note 44.

378. Email from Lisa S. Brodyaga, *supra* note 96; Email from Anne Monahan, Att’y, to Lee Terán, Clinical Professor of Law, St. Mary’s Univ. Sch. of Law (Sept. 21, 2011) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*); Interview with Nelly Vielma, *supra* note 318; Interview with Javier Maldonado, Att’y (Sept. 9, 2011) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*). See case of B.V. (charged with a drug possession conviction); case of C.J. (charged with false claim to citizenship and a drug possession conviction) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*); case of N.Q. (charged with unlawful presence) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*); case of M.J. (charged with drug possession) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*); case of J.L. (charged with trespass) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*). In a 2009 survey of thirty-one members of AILA working in Minnesota, thirty-eight percent of the attorneys reported they had represented “at least one U.S. citizen who was in immigration detention,” although the majority were derivative citizens instead of acquired citizens. See Jacob Chin et al., *Attorneys’ Perspectives on the Rights of Detained Immigrants in Minnesota*, 40 CURA REPORTER 16 (2010), available at <http://www.cura.umn.edu/sites/cura.advantagelabs.com/files/publications/40-1&2-Fennelly-et-al.pdf> (reporting that some attorneys had clients who were detained even when credible claims to U.S. citizenship had been exerted, and one described a case in which a U.S. citizen agreed to be deported in order to get out of detention).

379. INA § 275(a), 8 USC § 1325(a), penalizes “[a]ny alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.” *Id.* An alien who “enters, attempts to enter, or is at any time found, in the United States” after having been deported, excluded or removed is subject to prosecution under INA § 276. INA § 276(a), 8 U.S.C. § 1326(a) (2006).

380. See KURZBAN, *supra* note 358, at 326–27 (explaining that the government has increasingly used criminal prosecution in conjunction with civil removal); Chacon, *supra* note 56, at 1856–57 (explaining that there has been a “remarkable expansion in security-related expansions of the INA”). Consequently, prosecution rates in federal district court have soared to the point that more than one-half of all criminal cases are immigration related. KURZBAN, *supra* note 358, at 327. District courts located along the U.S. and Mexico border have seen their caseloads rise more than five-fold. See *Surge in Immigration*

sented, they are entitled to appointment of legal counsel if subject to criminal prosecution. Furthermore, in prosecutions under INA Section 275 and INA Section 276 citizenship of the defendant is a factor the government must prove.<sup>381</sup> During their investigation in these cases, federal public defenders have found that many of their clients were unaware that they had valid citizenship claims and are in fact U.S. citizens.<sup>382</sup>

The number of cases in some areas on the U.S. and Mexico border is significant and has resulted in changes in training and protocol for offices of federal public defenders. For instance, public defenders in the Southern and the Western Districts of Texas interview all defendants regarding their parentage and assign paralegals to investigate each case in which the client has a U.S. parent.<sup>383</sup> Attorneys who are federal public defenders cannot represent the defendants in their civil proceedings before the CIS and the immigration judges, but they assist the clients in obtaining evidence of the acquired citizenship as part of the defense to the immigration-related criminal charges.<sup>384</sup> In 2011, the Laredo, Texas office of the Federal Public Defender reported that twelve criminal prosecutions were dismissed by the federal court due to likely U.S. citizenship of the defendants, and two individuals obtained certificates of citizenship.<sup>385</sup> The other

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*Prosecutions Continues*, TRAC IMMIGRATION (June 17, 2008), <http://www.trac.syr.edu/immigration/reports/188> (illustrating that in March of 2008, such prosecutions increased by fifty percent from February 2008, and by almost seventy-three percent since 2007). Contributing to the increased prosecutions is the rise in individuals returning to the United States after removal. In 2005, forty-four percent of individuals arrested by DHS had prior removals; in 2010 the rate rose to fifty-six percent. See Damien Cave, *Crossing Over, and Over*, N.Y. TIMES, Oct. 3, 2011, at A1 (explaining that prosecution for illegal reentry has increased by two-thirds and is the most prosecuted federal felony).

381. See *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 722 (9th Cir. 2011) (stating that “alienage is a core element of the 8 U.S.C. § 1326 offense”); *United States v. Cervantez-Nava*, 281 F.3d 501, 504 (5th Cir. 2002) (explaining that the United States has the burden of proving alien status as an important element of any illegal re-entry charge). In *United States v. Smith-Baltiher*, a district judge stated, “there seems [to] be a lot of citizenship cases as a defense to 1326.” *United States v. Smith-Baltiher*, 424 F.3d 913, 918 n.5 (9th Cir. 2005).

382. Etter, *supra* note 9 (telling the story of an individual who was deported, despite the fact that it was likely that he was a U.S. citizen); Interview with Irma Whiteley, *supra* note 326; Interview with Maria Rangel, *supra* note 326.

383. Email from Horatio Aldredge, Asst. Pub. Fed. Defender, to Lee Terán, Clinical Professor of Law, St. Mary’s Univ. Sch. of Law (Feb. 3, 2010); Interview with David Castillo, Fed. Pub. Defender for the S. Dist. of Tex. (Sept. 21, 2011); Interview with Irma Whiteley, *supra* note 326; Interview with Shelly Strayer, Asst. Chief Investigator for the Fed. Pub. Defender’s Office for S. Dist. of Tex. (Sept. 21, 2011); Interview with Maria Rangel, *supra* note 326.

384. Interview with Irma Whiteley, *supra* note 326; Interview with Shelly Strayer, *supra* note 383; Interview with Maria Rangel, *supra* note 326.

385. Interview with Shelly Strayer, *supra* note 383.



ten individuals were referred to private attorneys for assistance in completing their applications for certificate of citizenship.<sup>386</sup> In the El Paso, Texas office of the Federal Public Defender, one investigator reports that she receives approximately one to two cases each week involving a possible U.S. citizen facing federal immigration-related prosecution.<sup>387</sup> In the past four years she reported that in sixteen of the cases she handled, criminal charges were dismissed and the defendants were issued certificates of citizenship by CIS.<sup>388</sup> An investigator with the McAllen, Texas office of the Federal Public Defender also stated there are significant numbers of individuals with a U.S. parent and viable claims to U.S. citizenship that her office represents in criminal prosecutions, and that she spends approximately twenty percent of her time investigating such cases.<sup>389</sup> Furthermore, the investigators working at the federal public defenders offices reported that many of the individuals who ultimately obtain a certificate of citizenship were charged with reentry after removal under INA Section 276, and consequently, were deported or removed before the claim to citizenship was discovered.<sup>390</sup>

## VI. EXTRAORDINARY MIGRATION AND UNRELENTING REMOVAL

Prior to April 1, 1997, the effective date of IIRIRA, an individual who was deported and later returned to the United States retained the right to present a claim to acquired citizenship in any subsequent deportation proceeding. Then, Congress enacted IIRIRA and expanded in INA Section 241(a)(5) the authority of INS/DHS to reinstate prior orders of de-

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386. *Id.* Four of the ten individuals whose criminal cases were dismissed are being represented by Attorney Nelly Vielma and she reported that each has a pending N-600 with CIS. Interview with Nelly Vielma, *supra* note 318.

387. Interview with Irma Whiteley, *supra* note 326.

388. *Id.*

389. Interview with Maria Rangel, *supra* note 326. Ms. Rangel stated that until five years ago she assisted defendants in preparing N-600s and she estimated her office handled about fifteen per year. *Id.* She no longer is able to assist in preparing applications for certificates of citizenship because the time for CIS adjudication of the N-600 exceeds one year. *Id.* Presently, she prepares the evidence of citizenship that will assist in obtaining dismissal of the criminal charges, and then refers the defendant to an immigration attorney or to the U.S. consulate abroad. *Id.* She stated that some individuals whose criminal cases are dismissed are removed by DHS, but after removal have been able to obtain a U.S. passport at the U.S. consulate. *Id.* She further stated that there are other individuals who are removed and did not prevail in their efforts to obtain a U.S. passport. *Id.* She was aware that some have re-entered the United States and been removed again by DHS. *Id.*

390. Interview with Irma Whiteley, *supra* note 326; Interview with Shelly Strayer, *supra* note 383; Interview with Maria Rangel, *supra* note 326. Irma Whiteley stated that most of her clients are men in their twenties or thirties, but she recalled two men in their sixties who had "struggled their whole lives" as undocumented immigrants when actually they were U.S. citizens. Interview with Irma Whiteley, *supra* note 326.

portation and removal.<sup>391</sup> Reinstatement of prior orders of deportation and removal departs significantly from past procedures and is fundamentally at odds with due process. The statute contains no procedure for adjudicating a claim to U.S. citizenship.<sup>392</sup> Prior orders of deportation and removal are reinstated and executed by low level immigration officers and under guidelines established by INS/DHS, the U.S. claimant has no opportunity for a hearing before an immigration judge.<sup>393</sup> Because the statute prohibits the filing of a motion to reopen, a U.S.-citizen claimant has no means to effectively challenge the prior deportation or removal order.<sup>394</sup>

Furthermore, the statutory scheme for judicial review of a reinstatement order is insupportable constitutionally. Congress has channeled the judicial review of all removal orders to the court of appeals, narrowed the filing deadline to thirty days and eliminated the automatic stay of removal.<sup>395</sup> The enactment of the REAL-ID Act in 2005 with an apparent elimination of writs of habeas corpus as an alternative means of review places some individuals who have unresolved claims to citizenship with-

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391. 8 U.S.C. § 1231(a)(5) (2000).

392. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2000).

393. See Reinstatement of Removal Orders, 8 C.F.R. § 241.8 (2010) (providing that an “alien has no right to a hearing before an immigration judge”; 62 Fed. Reg. 444, 451 (Jan. 3, 1997) (stating that the district director could reinstate a final order after verification of the individual’s identity and unlawful reentry, and that “[r]emoval would be accomplished under the proposed rule without referral to the Immigration Court.”).

394. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (stating that the prior order “is not subject to be reopened or reviewed”). Given the specific bar to reopening the prior order, it is unlikely that an individual who discovers a claim to acquired citizenship after having reentered the United States can utilize the statutory provisions for motions to reopen and to reconsider under INA § 240(c)(6) and (c)(7), 8 U.S.C. § 1229a(c)(6) and (c)(7) to present the claim to citizenship and request vacation of the order. Motions to reopen and to reconsider were once regulatory procedures and then codified by IIRIRA. *Dada v. Mukasey*, 554 U.S. 1, 14 (2008). The statute permits a respondent who is subject to a final order of removal to file one motion to reconsider within thirty days, INA § 240(c)(6), 8 U.S.C. § 1229a(c)(6), and one motion to reopen within ninety days, INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7). Motions to reopen and to reconsider clearly benefit an individual who seeks to assert a claim to citizenship prior to removal. See *Luna v. Holder*, 637 F.3d 85, 87 (2d Cir. 2011). Furthermore, post departure motions may also assist a citizenship claimant if filed within the statutory time constraints. *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (DHS regulation barring post departure motion to reopen conflicts with statutory right, *but see Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (concluding that departure after removal effectively overrides any *sua sponte* authority to reopen); *Mendiola v. Holder*, 585 F.3d 1303, 1310 (10th Cir. 2009) (even when underlying order is determined erroneous, it is not subject to reopening post departure).

395. INA §§ 242(a)(5), (b)(1), (b)(3)(B); 8 U.S.C. §§ 1252(a)(5), (b)(1), (b)(3)(B) (2000).

out an effective and adequate avenue for judicial review of reinstatement orders.<sup>396</sup>

The case of Wilfredo Garza, the son of a U.S.-citizen father, provides an example—Mr. Garza was ordered deported by an immigration judge and deported to Mexico by INS in 2001.<sup>397</sup> He reentered the United States and in 2005 was arrested and charged with violation of INA Section 276, reentry after deportation.<sup>398</sup> His lawyer discovered Mr. Garza had a claim to U.S. citizenship, obtained a dismissal of the criminal charge, and filed an N-600 application for certificate of citizenship.<sup>399</sup> But, as soon as Mr. Garza's criminal charges were dismissed by the federal district court, an INS officer, armed with an executed prior order of deportation, reinstated the order and despite Mr. Garza's protestations that he was a U.S. citizen, the officer deported Mr. Garza again to Mexico.<sup>400</sup> A few months later and after Mr. Garza had again reentered the United States without inspection, INS approved the N-600 and issued to Mr. Garza his certificate of citizenship.<sup>401</sup>

Some of those persons who had U.S.-acquired citizenship were discovered by federal public defenders during the course of federal criminal prosecutions have been released from custody and successfully obtained certificates of citizenship.<sup>402</sup> Most of the U.S. citizens found were born in Mexico.<sup>403</sup> However, federal public defenders and attorneys retained to represent citizenship claimants face considerable obstacles to prevent their clients from being removed to Mexico under reinstatement or-

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396. INA § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2005) (providing that notwithstanding any habeas corpus provisions, the petition for review to the court of appeals is "the sole and exclusive means for judicial review of an order of removal").

397. Etter, *supra* note 9.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. Interview with Irma Whiteley, *supra* note 326; Interview with Shelly Strayer, *supra* note 383; *see supra* Part V.C.

403. There are individuals who are from countries other than Mexico who have asserted claims to citizenship and yet been removed. *See, e.g.,* Minasyan v. Gonzales, 401 F.3d 1069, 1072 (9th Cir. 2004) (following his assertion of a claim to citizenship, a citizen of Armenia, who arrived in the United States when he was eight years old, was removed). But, the individuals who are found to be citizens while in custody of DHS and the U.S. Marshal are predominantly from Mexico. *Id.* In 2010, aliens from Mexico accounted for nearly 83 percent of all reinstatements. IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 7, at 3. Other leading countries included Honduras, Guatemala, and El Salvador. *Id.* These four countries accounted for ninety-eight percent of all reinstatements in 2010. *Id.*

ders.<sup>404</sup> Furthermore, the case of Wilfredo Garza is not isolated, and other individuals have been removed by DHS as they attempted to assert their claims to citizenship.<sup>405</sup>

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404. Email from Lisa S. Brodyaga, *supra* note 96 (explaining that the cases are a challenge and require the cooperation of the Assistant U.S. Attorney who is prosecuting the criminal reentry case to keep DHS from removing the client) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*); Interview with Javier Maldonado, *supra* note 378 (describing the work as difficult and time consuming, and often involving federal litigation, to challenge DHS' efforts to detain and remove individuals who are asserting claims to citizenship); Interview with Irma Whiteley, *supra* note 326 (detailing two occasions in which she had to run to the international bridge to prevent DHS from removing individuals who had been granted certificates of citizenship); Interview with Shelly Strayer, *supra* note 383 (explaining that clients of the Federal Public Defenders office have remained detained even after the certificate of citizenship was granted because DHS officers did not believe that the individuals were U.S. citizens) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

405. Lisa S. Brodyaga reported on a 2005 case involving a client, A.C., who was removed under a reinstatement order while attempting to assert a claim to citizenship. Email from Lisa S. Brodyaga, *supra* note 96; Anne Monahan represented J.H.V. who was born in Mexico to two U.S. parents. Email from Anne Monahan, *supra* note 378. He was deported in 2003, returned to the United States, and was charged with reentry after deportation. *Id.* Federal Public Defender Clare Koontz discovered his claim to citizenship and obtained a dismissal of the charges. *Id.* Although an N-600 application for certificate of citizenship was pending, DHS ordered reinstatement of the deportation order and removed J.H.V. again. *Id.* DHS dismissed the N-600 application because J.H.V. was no longer in the United States. *See* 8 C.F.R. § 301.1 (2010) (permitting the filing of an N-600 application to obtain citizenship; however, the individual must be able to appear in front of a USCIS officer to review their application). J.H.V. then reentered the United States again and traveled to Oklahoma, where a CIS officer finally approved his N-600 and awarded him a certificate of citizenship. Email from Anne Monahan, *supra* note 378. Rebecca Bernhardt's client, J.M. was subject to an expedited removal and then reentered the United States. Email from Rebecca Bernhardt, *supra* note 299. His father was a U.S. citizen who had been physically present more than the ten years required for J.M. to acquire citizenship. *Id.* J.M. was arrested in 2004 and charged with reentry after deportation. *Id.* His criminal case was dismissed when Federal Public Defender Kristen Etter discovered his claim to U.S. citizenship. *Id.* An N-600 was filed with the CIS and an adjudicator interviewed the father and made a preliminary determination that J.M. was eligible for a certificate of citizenship. *Id.* However, J.M.'s expedited removal order was reinstated and he was removed. *Id.* His N-600 was then dismissed because J.M. was no longer present in the United States. *Id.* J.M. brought an action in federal district court challenging the dismissal of the application for certificate of citizenship, and DHS finally granted the application and issued the certificate to J.M. *Id.* In 2011, the St. Mary's University School of Law Immigration Clinic was retained by J.L. to obtain a certificate of citizenship. Case on file with *The Scholar: St. Mary's Law Review on Minority Issues*. J.L. was born in Mexico to two U.S. citizen parents and yet, between 1975 and 2009 he was removed by INS and DHS multiple times, including under reinstatement of removal orders. *Id.* He states that each time he was arrested he informed INS and DHS officers that he was the child of two U.S. citizen parents. *Id.*

### A. Reinstatement of Removal

In 2001 38,943 individuals were removed from the United States under reinstatement orders.<sup>406</sup> By 2010 the number of reinstatement orders increased to 130,840.<sup>407</sup> With no provisions for a hearing before an immigration judge and limited means to challenge the underlying order, INA Section 241(a)(5) has become a swift and powerful tool of enforcement. In *Fernandez-Vargas v. Gonzales*,<sup>408</sup> the only case the Supreme Court has considered concerning reinstatement, the Court found that INA Section 241(a)(5) could be applied to individuals who were deported and reentered the United States before the effective date of IIRIRA.<sup>409</sup> Efforts to challenge the statute as a violation of the INA and the Fifth Amendment have to date failed.

#### 1. Procedures and Lack of Protections

Reinstatement of deportation or removal is not a new concept. It is a longstanding, although rarely used, authority enacted by Congress in 1950 to target a small group of anarchists and subversives who had previously been deported.<sup>410</sup> In the Immigration and Nationality Act of 1952 Congress enlarged the scope of the statute at former INA Section 242(f) to include individuals who had previously been deported under grounds of deportation tied to crimes, falsification of documents, and security.<sup>411</sup> Significantly, INA Section 242(f) was interpreted to authorize only immigration judges to reinstate deportation orders.<sup>412</sup> INS regulations provided for the issuance of an order to show cause, hearing before an immigration judge, and an order issued by the judge.<sup>413</sup> Consequently, individuals who were subject to reinstatement prior to IIRIRA were afforded a deportation hearing under the terms of former INA Section

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406. IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 7, at 4.

407. *Id.*

408. 548 U.S. 30 (2006).

409. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34 (2006).

410. Internal Security Act of 1950, Pub. L. No. 81-831, § 23, 64 Stat. 1012 (codified at 8 U.S.C. § 156); *Fernandez-Vargas*, 548 U.S. at 33.

411. INA § 242(f), 8 U.S.C. § 1252(f) (Repealed 1996); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 494 n.11 (9th Cir. 2007).

412. 8 C.F.R. § 242.22 (1991) (removed 1997); *see Arevalo v. Ashcroft*, 344 F.3d 1, 5 (1st Cir. 2003) (comparing INA § 242(f), which was repealed in 1996, with INA § 241(a)(5)).

413. 8 C.F.R. § 242.23 (1991); *see Morales-Izquierdo*, 486 F.3d at 499 (explaining that an alien was entitled to a hearing under former 8 C.F.R. § 242.23).

242(b), the statute which authorized the immigration judge to conduct proceedings “to determine the deportability of any alien.”<sup>414</sup>

IIRIRA accomplished several changes to the statute. INA Section 241(a)(5) substantially expanded the class of affected individuals from those charged under the few crime and security related section of the grounds of deportability to all non-citizens who had been previously subject to a deportation or removal order.<sup>415</sup> Furthermore, the statute prohibits the filing of a motion to reopen the prior order and constrains the relief available to individuals subject to reinstatement. INA Section 241(a)(5) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.<sup>416</sup>

After IIRIRA, INS opted to change the procedures for reinstatement. Regulations promulgated pursuant to INA Section 241(a)(5), vest full authority and discretion to low level officers to reinstate deportation and removal orders. The regulations at 8 CFR Section 241.8 affirmatively provide that “[t]he alien has no right to a hearing before an immigration judge in such circumstances.”<sup>417</sup> Additionally, the scope of inquiry by an immigration officer in a reinstatement case is very narrow: whether the individual is subject to a prior order; the identity of the individual; and whether the individual has unlawfully reentered the United States.<sup>418</sup>

The reinstatement regulation appears to exceed the statutory authority of the immigration judge. In IIRIRA, Congress replaced the former INA

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414. INA § 242 (b), 8 U.S.C. § 1252 (repealed in 1996). The statute referred to a special inquiry officer (later changed to immigration judge) and provided for broad powers in the conduct of the proceedings:

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation.

*Id.*

415. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 305(a)(3), 110 Stat. 3009 (proposing a new statute that allows for the reinstatement of removal orders for people who have reenter the United States); *Arevalo v. Ashcroft*, 344 F.3d 1, 5 (1st Cir. 2003).

416. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2000).

417. Reinstatement of Removal Orders, 8 C.F.R. § 241.8 (2010).

418. 8 C.F.R. §§ 241.8(a)(1), (2), (3).

Section 242(b), with new INA Section 240 which is consistent with the earlier section and unambiguously assigns to immigration judges the authority to determine an individual's removability.<sup>419</sup> The statute provides that the immigration judge "shall conduct proceedings for deciding the inadmissibility and deportability of an alien," and "unless otherwise specified," removal proceedings before the immigration judge "shall be the sole and exclusive procedure" for making such determinations.<sup>420</sup> The powers assigned to the immigration judge under the former INA Section 242(b) were incorporated in the new INA Section 240(b)(1). The immigration judge may administer oaths, receive evidence, and examine and cross-examine the respondent and any witnesses.<sup>421</sup>

Notably, INA Section 240 specifies that there are alternative removal procedures to those specified in the statute.<sup>422</sup> The statute provides for expedited removal proceedings in a number of circumstances, for instance when the government determines that an applicant for admission is inadmissible on grounds of misrepresentations or lack of proper documents,<sup>423</sup> when an applicant is inadmissible on security grounds,<sup>424</sup> and when a non-permanent resident has been convicted of an aggravated felony.<sup>425</sup> But, INA Section 240 does not exempt the procedures for reinstatement of prior orders from the requirement that an immigration judge determine issues of inadmissibility and deportability. Furthermore, Congress did not in INA Section 241(a)(5) create any alternative procedures which would exempt reinstatement from the general provisions of INA Section 240.<sup>426</sup>

Comparison between the expedited removal and reinstatement of removal schemes is also instructive. Neither statute provides for a hearing to determine a claim to U.S. citizenship.<sup>427</sup> However, while low level immigration officers may order the "expedited removal" of non-citizens in a

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419. INA § 240(a)(1), (3) & (b)(1), 8 U.S.C. § 1229a(a)(1),(3) & (b)(1); *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 503 (9th Cir. 2007) (Thomas, J., dissenting).

420. INA § 240(a)(1), (3), 8 U.S.C. § 1229a(a)(1), (3) (2000).

421. *Id.* § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2000).

422. The statute provides, "[u]nless otherwise specified in this chapter" and "[n]othing in this section shall affect proceedings conducted pursuant to section 1228 of this title." INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3).

423. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

424. INA § 235(c), 8 U.S.C. § 1225(c).

425. INA § 238, 8 U.S.C. § 1228.

426. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5).

427. INA § 235(c), 8 U.S.C. § 1225(c); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). Because Congress made no specific provisions for claims to citizenship in the expedited removal and reinstatement of removal statutes, it would therefore appear that Congress anticipated that all citizenship claims would be heard before an immigration judge in INA § 240 proceedings. Benson, *supra* note 26, at 1449 n.185.

procedure conducted without a hearing before an immigration judge,<sup>428</sup> regulations provide that when the applicant makes a claim to U.S. citizenship, the claim *must* be evaluated by an immigration judge in what is referred to as “a claimed status review hearing.”<sup>429</sup> No comparable procedure was provided for in the regulations promulgated for INA Section 241(a)(5) reinstatement of prior deportation and removal orders.<sup>430</sup>

Under the regulations, reinstatement of a prior order of deportation or removal begins with completion of form I-871, Notice of Intent to Reinstate.<sup>431</sup> The notice includes a statement that the individual is an alien who is subject to a prior order of deportation or removal and who reentered the United States.<sup>432</sup> The regulations provide that the individual who is subject to reinstatement can make a statement and that “the officer shall allow the alien to do so and shall consider whether the alien’s statement warrants reconsideration of the determination.”<sup>433</sup> However, in most cases, particularly involving Mexicans arrested near the U.S./Mexico border, the process of reinstatement of removal can be completed in a matter of hours.<sup>434</sup>

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428. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A); Memorandum from John P. Torres, Acting Dir. Office of Detention and Removal Operation, U.S. Immigration and Customs Enforcement, to Field Office Dirs., Detention and Deportation Officer’s Field Manual § 14.8 (March 27, 2006), (available at <http://www.immigration.com/sites/default/files/icedetention.pdf>) [hereinafter Memorandum from Torres].

429. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (2000); *In re Efrain Lujan-Quintana*, 25 I&N Dec. 53, 54 (B.I.A. 2009) (citing 8 C.F.R. § 1235.3(b)(5)(iv) (2010)).

430. Reinstatement of Removal Orders, 8 C.F.R. § 241.8 (2010).

431. Memorandum from Torres, *supra* note 428, § 14.8(b)(3).

432. *Id.*

433. 8 C.F.R. § 241.8(a)(3). This officer is the same officer who made the initial determination, and is only required to “consider” the statement. TRINA REALMUTO, AM. IMMIGRATION LAW FOUND., REINSTATEMENT OF REMOVAL, A PRACTICE ADVISORY 4 (July 2006), available at <http://www.aifl.org/lac/pa/reinstatement.pdf>.

434. Email from Lisa S. Brodyaga, *supra* note 96. “Due to the lack of a hearing and speed at which the orders are executed and issued, removal under INA § 241(a)(5) is sometimes called summary removal.” See also Maria Baldini-Potermin, *It’s Time to Consider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations and the Race to the Courthouse*, 86 INTERPRETER RELEASES 1477, 1478 (2009) (“[D]aily buses leave from DHS and contract detention facilities along the U.S.-Mexico border.”). In cases challenging the implementation of INA § 241(a)(5) and 8 C.F.R. § 241.8, the petitioners raise a number of serious challenges to the procedures for reinstatement. In *Arreola-Arreola v. Ashcroft*, 383 F.2d 956, 960 n.5 (9th Cir. 2004) the petitioner stated that the reinstatement form was “written in English only, did not inform Arreola that he had a right to hire an attorney; and the INS did not serve an alien’s existing counsel with the form.” In *Castro-Cortez v. INS*, 239 F.3d 1037, 1049–50 (9th Cir. 2001), the petitioners alleged they were denied the right to access to their attorneys and that they were provided no opportunity to submit evidence before the INS. See also *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 506–07 (9th Cir. 2007) (opining that the failure to follow proper



Reinstatement of deportation and removal orders under INA Section 241(a)(5) is unquestionably intended to expedite the removal of non-citizens. To an officer examining an individual identified with a prior order of deportation or removal that has been executed, reinstatement of the order will appear unassailable.<sup>435</sup> But, while the statute streamlines the procedures to reinstate old orders of deportation and removal, there is no indication that Congress intended to depart from the well-established structure for determining an individual's citizenship. As implemented, INA Section 241(a)(5) and its regulations include no protection against the unintended removal of a U.S. citizen.<sup>436</sup>

In the case of Wilfredo Garza, the criminal prosecution for reentry after deportation was dismissed by a federal district judge due to the likelihood Mr. Garza acquired citizenship, Mr. Garza filed an application for certificate of citizenship with DHS, and he repeatedly told the officer that he had a claim to citizenship.<sup>437</sup> DHS failed to consider Mr. Garza's claim and simply removed him.<sup>438</sup> The risk of removal of individuals with citizenship claims is high when examination by DHS is limited to the identity of the individual subject to reinstatement and whether he has previously been deported or removed.<sup>439</sup> The procedures implemented by DHS fail to require at a minimum a full and objective investigation of the claim, cancellation of the reinstatement order, and referral to the immigration judge.<sup>440</sup> The unbridled use of INA Section 241(a)(5) under procedures where there is no hearing before an immigration judge and no

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reinstatement procedures breaks apart families across the United States, who would otherwise be allowed to stay together).

435. *Rivera v. Ashcroft*, 394 F.3d 1129, 1140 (9th Cir. 2005). The DHS may rely on estoppel and argue that the prior order of deportation or removal is a final determination of citizenship; however, an unrepresented individual who did not understand he had a claim and was not notified by DHS and the immigration judge of the conditions for acquisition of citizenship should be provided an opportunity to fully present a claim to acquire citizenship in a later hearing. *United States v. Smith-Baltiher*, 424 F.3d 913, 925–26 (9th Cir. 2005).

436. *See* Reinstatement of Removal Orders, 8 C.F.R. § 241.8 (2010) (essentially making reinstatement of deportation automatic); 64 Fed. Reg. 10312, 10236 (Mar. 6, 1997) (discussing the public concerns after the proposed regulation amendments following IIRIRA). During the public comment period, the Federal Register notes that several members of the public expressed concern about the lack of protective procedures in the reinstatement process. *Id.* The Service rebutted that the provision in the regulation requiring fingerprints to verify identity of the individual was sufficient to “adequately address the concerns expressed by the commentators.” *Id.* Of note, however, is that the regulation does contain special safeguards for aliens with a viable claim under Convention Against Torture provisions. Reinstatement of Removal Orders, 8 C.F.R. § 241.8.

437. *Etter*, *supra* note 9.

438. *Id.*

439. Reinstatement of Removal Orders, 8 C.F.R. § 241.8.

440. *See* Trina Realmuto, *supra* note 433.

meaningful opportunity to present a claim to citizenship all but guarantees that individuals like Mr. Garza who have unresolved claims to U.S. citizenship are removed.

a. Court Challenges

The Supreme Court has yet to address whether the government's delegation to low level immigration official the authority to reinstate deportation and removal orders raises a constitutional problem. In *Fernandez-Vargas v. Gonzales*, the petitioner relied on a presumption against retroactivity and challenged the application of amendments to INA Section 241(a)(5) to individuals who unlawfully reentered the United States after deportation orders entered prior to the effective date of IIRIRA.<sup>441</sup> The Court found the statute had no impermissible retroactive effect and ruled "the statute applies to stop an indefinitely continuing violation that the alien could end at any time by leaving the country."<sup>442</sup> Thus, the government is empowered to reinstate deportation and removal orders entered at any time.<sup>443</sup>

In a number of federal courts, challenges to the authority of low-level officers to reinstate removal orders have failed.<sup>444</sup> The courts that have considered these cases have found that Congress intended reinstatement to be a process uncomplicated by the questions normally heard in removal proceedings and have declined to require that DHS institute proceedings under INA Section 240 for purposes of reinstatement of prior orders. Furthermore, the courts have rejected claims that the implementation of INA Section 241(a)(5) is a violation of due process.<sup>445</sup>

In *Morales-Izquierdo v. Gonzales*<sup>446</sup> the Ninth Circuit in an en banc decision rejected the notion that removal proceedings before an immigration judge are required for reinstatement of removal orders.<sup>447</sup> The court found that Congress intended to expand the class of non-citizens subject to reinstatement and at the same time to narrow defenses normally avail-

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441. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 (2006).

442. *Id.* at 45.

443. *See Fernandez-Vargas*, 548 U.S. at 46 (explaining that IIRIRA enlarged the class of individuals whose prior deportation and removal orders are likely to be reinstated, and limited relief options for those subject to reinstatement).

444. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 487–88, 498 (9th Cir. 2007); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 846 (8th Cir. 2006); *De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1282–83 (11th Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 20 (1st Cir. 2004).

445. *Morales-Izquierdo*, 486 F.3d at 498; *Ochoa-Carrillo*, 437 F.3d at 847; *Lattab*, 384 F.3d at 20–21; *De Sandoval*, 440 F.3d at 1285–86.

446. 486 F.3d 484 (9th Cir. 2007).

447. *Id.* at 498. *Morales-Izquierdo* argued that a reinstatement order was the functional equivalent of a removal order under INA § 240 which requires an individual hearing. *Id.* at 490.

able to non-citizens in removal proceedings.<sup>448</sup> To accomplish this goal, the court reasoned that reinstatement proceedings were intended to be summary in nature.<sup>449</sup> Removal proceedings generally entail two inquiries: (1) removability of the individual and (2) eligibility “for relief from removal,”<sup>450</sup> but the court found that reinstatement proceedings need not address settled and “relatively straightforward” questions of inadmissibility and deportability questions and the statute prevents the assertion of any type of relief from removal and forecloses the opportunity to reopen the prior decision.<sup>451</sup> The statute’s narrowed scope of the inquiry could, according to the court, be safely carried out by low-level immigration officials who perform routine ministerial enforcement actions.<sup>452</sup>

Judge Thomas wrote for the dissent. He argued that INA Section 241(a)(5) must be considered in the context of the statute as a whole and that Congress is presumed to “create a ‘symmetrical and coherent regulatory scheme.’”<sup>453</sup> He opined that reinstatement orders are a sub-set of removal orders, and INA Section 240 unambiguously provides the structure by which immigration judges determine questions of inadmissibility and deportability in a setting that provides all procedural protections to individuals in removal proceedings.<sup>454</sup> Judge Thomas further warned that reinstatement of removal approaches a “constitutional danger zone”<sup>455</sup> in which the procedures became so streamlined that individuals subject to reinstatement orders are stripped of “any meaningful opportunity to raise potentially viable legal, constitutional, or factual challenges to their removability.”<sup>456</sup>

In other cases the authority of low level immigration officers to reinstate removal orders has been similarly challenged as a violation of due process.<sup>457</sup> Notwithstanding, the courts have declined to require that DHS institute proceedings consistent with INA Section 240 prior to reinstatement of removal, finding instead, as did the court in *Morales-Izquierdo v. Gonzales*, that Congress intended reinstatement to be a

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448. *Morales-Izquierdo*, 486 F.3d at 494.

449. *Id.* at 491.

450. *Id.*

451. *Id.*

452. *Id.*

453. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 500 (9th Cir. 2007) (Thomas, J., dissenting) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

454. *Id.*

455. *Id.* at 505.

456. *Id.* at 507.

457. *Ponta-Garcia v. Att’y Gen.*, 557 F.3d 158, 162 (3rd Cir. 2009); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 846 (8th Cir. 2006); *De Sandoval v. U.S. Att’y Gen.*, 440 F.3d 1276, 1282–83 (11th Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 20 (1st Cir. 2004).

process uncomplicated by questions normally heard in removal proceedings.<sup>458</sup>

### B. *Changes in Judicial Review*

At the conclusion of his dissent in *Morales-Izquierdo*, Judge Thomas spoke to the challenges faced by individuals in reinstatement proceedings after the REAL ID Act withdrew the power of federal courts to review removal orders in habeas corpus proceedings.<sup>459</sup> He stated that limits placed on the power of the district court to hear challenges to reinstatement orders “approaches a second and independent ‘constitutional danger zone.’”<sup>460</sup> The current scheme for judicial review of reinstatement orders places individuals who raise a previously unresolved claim to citizenship with limited and restricted avenues for review.

The dangers are illustrated in the case of P.H., who like Wilfredo Garza, was subject to a reinstatement order, and struggled to have his claim to citizenship recognized by the government. P.H. was charged with reentry after removal under INA Section 276 and then learned that he had a claim to citizenship from the federal public defender who repre-

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458. *Ponta-Garcia*, 557 F.3d at 163; *Morales-Izquierdo*, 486 F.3d at 498; *Ochoa-Carrillo*, 437 F.3d at 847; *De Sandoval*, 440 F.3d at 1285–86; *Lattab*, 384 F.3d at 20–21. In most cases, the courts found no serious challenge to the underlying question of removability. In *Morales-Izquierdo*, *supra* at 496–97, the court found that the petitioner failed to raise a substantial claim and that “the risk of erroneous deprivation is extremely low.” *Id.* The court further determined that even if Mr. Morales-Izquierdo had a legitimate challenge, “he will be able to pursue it *after he leaves the country* . . .” *Id.* at 498 (emphasis added). In *Lattab v. Ashcroft*, the court also determined that the petitioner did not raise issues which disputed his removability, but opined, “Although this case does not provide a vehicle for testing the merits of the constitutional claim, we do not mean to imply that the claim is insubstantial. The summary reinstatement process offers virtually no procedural protections.” *Id.* at 21 n.6. In a case in which the petitioner presented a substantial challenge to removability, a claim to citizenship, the court declined to rule on the validity of the reinstatement statute and regulations. In *Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001), the court reviewed the appeal of a reinstatement order involving a U.S. citizen claimant and remanded the case to the district court for a determination on the claim; however, the court did not evaluate the reinstatement process under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) and 8 C.F.R. § 241.8. *Id.* at 17. Then, in *Ponta-Garcia*, the court addressed the reinstatement of removal against an individual who claimed to have last entered the U.S. as a legal resident, and found that the regulation authorizing DHS to issue reinstatement orders without a hearing before an immigration judge was a reasonable construction of the statute. *Id.* at 162–63. Under the express terms of INA § 241(a)(5) the court was prevented from reopening the original deportation order, but the court found it had “authority to determine the appropriateness of its resurrection” and remanded the question of Mr. Ponta-Garcia’s status to the DHS. *Id.* at 163 (quoting *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003)).

459. *Morales-Izquierdo*, 486 F.3d at 508–09 (9th Cir. 2007) (Thomas, J., dissenting).

460. *Id.* at 508.

sented him during the criminal proceeding. P.H. immigrated to the United States through a petition filed by his U.S.-citizen mother, but he was deported following a conviction and then reentered the United States. His potential claim to citizenship was never raised during his prior deportation hearing.<sup>461</sup> The evidence collected by the public defender concerning P.H.'s parent's U.S. birth and residence in the United States prior to P.H.'s birth, convinced the U.S. Attorney and the federal district judge of P.H.'s claim to citizenship and the reentry after removal charges were dismissed. P.H. also filed his application for a certificate of citizenship, based largely on testimonial evidence. When the application was denied on the ground that the mother lacked documentary evidence of her presence in the United States before P.H. was born, DHS moved to remove P.H. under an order of reinstatement of P.H.'s prior deportation order. P.H. filed a petition for review after the thirty day deadline for appealing removal orders. He faced removal to Mexico and he had no means, by way of a removal hearing before an immigration judge or a habeas corpus proceeding in district court, to review administrative decisions regarding his claim to citizenship and the reinstatement of the prior removal order.<sup>462</sup>

### 1. Review of Reinstatement Orders

When Congress enacted IIRIRA it expanded the power of the government in INA Section 241(a)(5) to subject "vastly more aliens within the sweep of the reinstatement provision."<sup>463</sup> Under the plain language of the statute, "the prior order of removal . . . is not subject to being reopened or reviewed . . . ."<sup>464</sup> Additionally, when Congress crafted the rules for appeals of removal orders in INA Section 242 under IIRIRA, no provision appeared for federal court review of reinstatement orders.<sup>465</sup> Uncertain what court, if any, had jurisdiction to challenge reinstatement

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461. Case on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

462. Case on file with *The Scholar: St. Mary's Law Review on Minority Issues*. See Email from Lisa S. Brodyaga, *supra* note 96 (describing a time when her client was removed after he filed an out of time petition for review); Interview with Maria Rangel, *supra* note 326; Interview with Shelly Strayer, *supra* note 383; Interview with Irma Whiteley, *supra* note 326 (who explained that they cannot assist all defendants with acquired citizenship claims and defendants must pursue their claims before the DHS pro se).

463. *Morales-Izquierdo*, 486 F.3d at 494; see *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, div. C, § 305(a)(3), 110 Stat. 3009 (amending and adjusting the status requirements to include a broader range of aliens in the reinstatement provision).

464. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2000). See *supra* note 394 for discussion on motions to reopen and to reconsider.

465. INA § 242, 8 U.S.C. § 1252 (2006); The apparent restriction to any review in INA § 241(a)(5) and the lack of any provision for review in INA § 242 led to cases filed in

orders, litigants used the traditional means of review of removal orders in habeas corpus proceedings and petitions for review directed to the courts of appeals.<sup>466</sup>

The Supreme Court found in *INS v. St. Cyr* that “[t]he writ of habeas corpus has always been available to review the legality of Executive detention[.]”<sup>467</sup> and ruled that congressional efforts to deprive the federal courts of the power to review removal orders without providing an adequate substitute raised a serious constitutional question under the Suspension Clause.<sup>468</sup> Congress responded to *St. Cyr* with the enactment of the REAL ID.<sup>469</sup> To avoid any further constitutional challenges to the scheme for judicial review of removal orders, Congress amended INA Section 242 to enlarge the jurisdiction of the courts of appeal to review “constitutional claims or questions of law.”<sup>470</sup> To “ensure that criminal aliens received the same type and amount of judicial review as other aliens,”<sup>471</sup> Congress eliminated habeas corpus proceedings as a vehicle for review of removal orders.<sup>472</sup>

Thus, in its present form INA Section 242(a)(2)(D) provides review in the courts of appeals of a reinstatement of a deportation/removal order.<sup>473</sup> Furthermore, any removal order, including a reinstatement of re-

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district courts under habeas jurisdiction and in the courts of appeal through a petition for review. *Sifuentes-Barraza v. Garcia*, 252 F. Supp. 2d 354, 361 (W.D. Tex. 2003).

466. *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 510 (5th Cir. 2006).

467. *INS v. St. Cyr*, 533 U.S. 289, 305 (2001).

468. *Id.* The Suspension Clause at U.S. CONST. art I, § 9, cl.2 provides that “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” *Id.* at 336–37.

469. *See Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 116 (2nd Cir. 2008) (explaining that the purpose of the REAL ID Act is to “provide an ‘adequate and effective’ alternative to habeas corpus”).

470. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(D), 119 Stat. 231. The statute provides, “Nothing in subparagraph (B) or (C), or in any other provision of his Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2011). *See also Ruiz-Martinez*, 516 F.3d at 113 (explaining that the REAL ID Act also provided that “sole and exclusive means for judicial review of final orders” are petitions of review filed in the correct Courts of Appeals); *Kolkevich v. Att’y Gen.*, 501 F.3d 323, 328 (3rd Cir. 2007) (emphasizing that nothing in the Act precludes questions of law brought in the correct court of appeals or review of constitutional claims).

471. *Ruiz-Martinez*, 516 F.3d at 117.

472. REAL ID Act of 2005, § 106(a)(1).

473. Without regard to INA § 241(a)(5), 8 U.S.C. § 1235(a)(5) (stating that reinstatement orders not subject appeal) and without regard to INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (mandating that review is not available to orders based on crime based grounds), review of reinstatement orders can proceed. *See Ramirez-Molina v. Ziglar*, 436

removal order, that contains a claim to citizenship, is reviewable under INA Section 242(b)(5)<sup>474</sup> and limits district court participation only when “genuine issues of material fact” warrant remand by the court of appeals.<sup>475</sup> The admonishment at INA Section 242(b)(5)(C), “[t]he petitioner may have such nationality claim decided only as provided in this paragraph” appears to preempt district court review of reinstatement orders under INA Section 360 or any action in habeas corpus.<sup>476</sup>

Following enactment of the REAL ID Act, habeas corpus petitions pending at the district court level were transferred to the courts of appeal and converted to petitions for review.<sup>477</sup> REAL ID was effective immediately and applied to cases “in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after” May 11, 2005, the Act’s effective date.<sup>478</sup> Included in the habeas corpus cases were pending claims to citizenship, and post-REAL ID review of those questions was to be determined under INA Section 242(b)(5).<sup>479</sup>

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F.3d 508 (5th Cir. 2006) (finding that the court of appeals does have jurisdiction to determine a due process challenge to reinstatement of removal).

474. *Batista v. Ashcroft*, 270 F.3d 8, 13 (1st Cir. 2001).

475. *Id.* The court stated that normally the court would review only the “administrative record on which the order of removal is based” under INA § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A). *Id.* But INA § 242(b)(5), 8 U.S.C. § 1252(b)(5) directed the court to consider “pleadings and affidavits” in its determination whether a genuine issue of fact existed. *Id.* Notwithstanding, the court also admonished respondents who assert a claim to citizenship that they do not have “an automatic right to have new evidence considered on appeal . . . the statute merely indicates that such evidence may be considered.” *Id.* at 15.

476. *But see Flores-Torres v. Mukasey*, 548 F.3d 708, 711 (9th Cir. 2008) (finding that petitioner successfully challenged his unlawful detention by filing a habeas corpus petition after being detained pending removal proceedings where he asserted a claim to citizenship). Furthermore, it may be argued that the district court retains jurisdiction under the APA over citizenship claims raised in reinstatement proceedings. In *Wong Yang Sung*, the Supreme Court struck down a procedure by which immigration inspectors were authorized to investigate cases and enter deportation orders. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1950). The Court found the comingling of investigative and adjudicative functions particularly objectionable and held that protections under the APA are triggered by deportation proceedings that lack procedural safeguards guaranteed by due process. *Id.* at 49–50. While the *Wong* case has received little attention, it has not been directly overturned. *See William Funk, The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. R. 881, 881 (2006) (observing that neither *Wong* nor the *Wong* doctrine has been expressly overturned by the Supreme Court).

477. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231; *see Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 113 (2nd Cir. 2008) (comparing the requirements before and after passage of the Act).

478. REAL ID Act of 2005, § 106(b).

479. *Id.* § 106(c); *see Jordan v. Att’y Gen.*, 424 F.3d 320, 326 (3rd Cir. 2005) (“The REAL-ID Act . . . allows us to avoid the dense thicket of habeas jurisdiction over nationality claims.”); *Baeta v. Sonchik*, 273 F.3d 1261, 1265 (9th Cir. 2001) (transferring the case, yet determining that there is no issue of material fact on which to “justify an evidentiary

## 2. Habeas Post-REAL ID

While the present scheme for review of removal orders in the courts of appeals provides citizenship claimants in reinstatement proceedings with a means to challenge removal, the question remains: do obstacles to accessing the courts of appeals give these claimants adequate and effective judicial review absent the availability of the writ of habeas corpus?<sup>480</sup> Individuals that are in reinstatement proceedings and intent on asserting claims to citizenship, are detained and facing criminal prosecution for violation of INA Section 276 reentry after removal. The Federal Public Defender appointed to represent the defendant in the criminal prosecution may assist in acquiring evidence to support the claim to citizenship, but they are unable to appear in proceedings before DHS and federal courts related to the citizenship claim.<sup>481</sup> Filing a petition for review in the court of appeals presents a daunting and for many an impossible task.<sup>482</sup> The location of the court of appeals, filing requirements, limited availability of counsel, and the lack of a developed record are significant challenges facing U.S.-citizen claimants.

The courts of appeal may be located far from where the individual who is claiming citizenship is detained<sup>483</sup> and the organizing and filing the petition is a process not easily accomplished. For instance, a petition for

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hearing on nationality); *Batista*, 270 F.3d at 12 (finding that transfer of a removal order was proper under the act).

480. Habeas corpus petitions can be prepared with greater ease than petitions for review because the district court is more accessible and there is no time deadline. *Ruiz-Martinez*, 516 F.3d at 113 (explaining that there is no time limit for filing a habeas corpus petition under 28 U.S.C. § 2241). See also GERALD SEIPP, IMMIGRATION BRIEFINGS, FEDERAL COURT JURISDICTION TO REVIEW IMMIGRATION DECISIONS: A TUG OF WAR BETWEEN THE THREE BRANCHES 4 (Apr. 2007) (discussing the ease of summary removal at the border and explaining that if the applicant for admission does not express a “credible fear of persecution” the removal order will be issued without review by an immigration judge). But see Nancy Morowetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L. J. 13, 15–16 (2005) (discussing the challenges to obtaining habeas corpus relief when DHS selects detention sites.)

481. See *supra* Part V.C. The office of the federal public defender assists the client in obtaining evidence of acquired citizenship as part of the preparation of the criminal defense. Unless the client can retain an immigration attorney, he must file and pursue the N-600 pro se. Interview with David Castillo, *supra* note 383. See also the case of P.H. in which he filed his N-600, appeal to the AAO and petition for review to the Fifth Circuit pro se. Case on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

482. See Baldini-Pottermin, *supra* note 434, at 1481 (explaining that there is an extremely high standard for motions for stays of removal).

483. Individuals pending removal in South Texas are most likely detained in detention in Pearsall, Karnes City, Laredo, or Los Fresnos, Texas, far from the Court of Appeals for the Fifth Circuit in New Orleans, Louisiana.



review no longer entitles a petitioner to an automatic stay of removal,<sup>484</sup> and a motion to stay the order must be prepared and filed with the petition. At the stage that a petition for review is filed, the record for review may be sparse and consist of the documents and affidavits prepared for filing with an N-600 or U.S. passport. Because DHS has not instituted a removal proceeding under INA Section 240, there is no record of a proceeding in which evidence and testimony was taken and evaluated by an immigration judge.<sup>485</sup> Finding pro bono counsel or an attorney among the few public interest organizations to assist with federal court review is difficult at best.

However, the most serious hurdle to review under INA Section 242 is the time constraint and the requirement that the petition for review be filed in thirty days.<sup>486</sup> The thirty-day deadline is “a strict jurisdictional prerequisite” for review of a removal order.<sup>487</sup> Individuals in reinstatement proceedings who are facing criminal charges for reentry after removal under INA Section 276 must be prepared to file the petition for review shortly after the time of arrest which is when the reinstatement order is normally executed by the DHS officer.<sup>488</sup> If the citizen claimant waits until after the criminal case is completed, s/he has more than likely missed the thirty-day deadline.<sup>489</sup> That is the scenario that faced P.H. He filed a petition for review of the reinstatement order at the time his crimi-

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484. INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (2000) (“Service of the petition on the officer or employee does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”); Benson, *supra* note 270, 68–69.

485. See *Lattab v. Ashcroft*, 384 F.3d 8, 21 n.6 (1st Cir. 2004) (“While judicial review of reinstatement orders is available in courts of appeals . . . that review may not be adequate when the alien has not been given a meaningful opportunity to develop an administrative record.”). The statutory scheme in INA § 242 presupposes that the review of nationality claims in the court of appeals was litigated in removal proceedings and the claimant has exhausted administrative remedies. See INA § 242(d)(1), 8 U.S.C. § 1232(d)(1) (2000); *Moussa v. INS*, 302 F.3d 823, 825 (8th Cir. 2002) (explaining that a court may not review a final order of removal until all administrative remedies that are available to an alien have been completely exhausted).

486. INA § 242(b)(1), 8 U.S.C. § 1232(b)(1) (2000); see *Batista v. Ashcroft*, 270 F.3d 8, 12 (1st Cir. 2001) (explaining that “an alien seeking judicial review of a reinstated removal order must file a petition for review in this court within [thirty] days of the date of the reinstatement of removal order”); see also *Malvoisin v. INS*, 268 F.3d 74, 75 (2nd Cir. 2001) (explaining that the thirty day filing deadline is “a strict jurisdictional prerequisite”).

487. *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 113–14 (2nd Cir. 2008); *Malvoisin*, 268 F.3d at 75.

488. See *Malvoisin*, 268 F.3d at 76 (explaining that even after a show of good cause, courts are “expressly prohibited from extending the prescribed time,” which makes it imperative for the alien to file as soon as possible).

489. See *id.* at 75 (finding that it was inappropriate to extend the thirty-day deadline even though the plaintiff’s reasons “might be cause for extending”).

nal case was dismissed but the reinstatement order was dated more than thirty days before the criminal case was dismissed.

Since the enactment of REAL ID in 2005, a number of courts have considered whether review under INA Section 242 in the federal court of appeals is an adequate and effective substitute for the writ of habeas corpus, the question raised in *St. Cyr*.<sup>490</sup> A variety of circumstances prevented the petitioners from perfecting their appeals to the courts of appeals, but the courts determined that the present statutory scheme post-REAL ID provides sufficient relief and is not unconstitutional.<sup>491</sup>

The Second Circuit addressed whether a petition for review provides an adequate and effective substitute for habeas corpus in *Ruiz-Martinez v. Mukasey*,<sup>492</sup> a case in which the petitioners sought habeas corpus review of their removal orders in district court immediately following passage of the REAL ID Act. They had failed to file petitions for review in the court of appeals within the thirty day deadline set by INA Section 242(b)(1) due to circumstances common to immigrants, “language barriers, immigration detention, and the attendant difficulties that might affect a detained alien’s opportunity to compose and file a petition for review.”<sup>493</sup> The court afforded the parties a grace period for the filing of petitions for review.<sup>494</sup> However, the court concluded that the thirty-day filing deadline was jurisdictional and that a petition for review to the court of appeals, even with the statute of limitations, remains an adequate and effective substitute for habeas corpus.<sup>495</sup>

The Ninth Circuit in *Iasu v. Smith*<sup>496</sup> reconsidered *Rivera v. Ashcroft*,<sup>497</sup> the earlier case in which the court decided that extreme circumstances permit a habeas proceeding in district court for purposes of determining a citizenship claim.<sup>498</sup> Mr. Iasu filed a habeas corpus petition in district court following the enactment of the REAL ID Act, and the Ninth Circuit ruled that “the district court plainly lacked habeas juris-

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490. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

491. *Ruiz-Martinez*, 516 F.3d at 105; *Mohammed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007); *Iasu v. Smith*, 511 F.3d 881, 892 (9th Cir. 2007); *De Ping Wang v. DHS*, 484 F.3d 615, 618–19 (2d Cir. 2006). *Alexandre v. U.S. Att’y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006);

492. 516 F.3d 102 (2nd Cir. 2008).

493. *Ruiz-Martinez*, 516 F.3d at 115.

494. *Id.* at 117.

495. *Id.*

496. 511 F.3d 881 (9th Cir. 2007).

497. 394 F.3d 1129 (9th Cir. 2005). *See also* *Luna v. Holder*, 637 F.3d 85, 87 (2d Cir. 2011) (deciding whether “the statutory motion to reopen process is an adequate and effective substitute for habeas”).

498. *Rivera v. Ashcroft*, 394 F.3d 1129, 1137 (9th Cir. 2005).

diction.”<sup>499</sup> The court reasoned that Mr. Isau had an avenue that would “suffice to alleviate Suspension Clause concerns,” a motion to reopen his removal.<sup>500</sup> Mr. Isau had not been removed from the United States, and the court determined that filing a motion to reopen to the Board of Immigration Appeals could potentially provide him with the relief he sought and trigger anew his right to appeal to the court of appeals.<sup>501</sup>

The courts in *Iasu* and *Ramirez-Martinez* did not address the central question here—whether REAL-ID violates the Suspension Clause of the U.S. Constitution as applied to individuals in reinstatement proceedings who assert a claim to U.S. citizenship. The petitioners in *Ramirez-Martinez* were not claiming U.S. citizenship and while the court was sympathetic to the obstacles they faced in pursuing their appeals, ultimately the court determined that Congress, mindful of the decision in *St. Cyr*, ensured “all aliens received an equal opportunity to have their challenges heard.”<sup>502</sup> In the *Iasu* case the court was faced with a U.S. citizen claimant, but reasoned that existing administrative and judicial avenues were still available to him and provided adequate opportunity for review.<sup>503</sup>

P. H. and other individuals in reinstatement proceedings are potentially United States citizens and under the present statutory scheme, their *sole* avenue for review of the reinstatement order and their claim to citizenship is the thirty day petition for review to the courts of appeals.<sup>504</sup> They have no other administrative or judicial option. INA Section 241(a)(5) forecloses any opportunity for a motion to reopen or review of the prior order of deportation or removal, and the regulation implemented by DHS, 8 CFR Section 241.8, deprives them of a hearing before an immigration judge and appeal to the Board of Immigration Appeals.<sup>505</sup>

### 3. Forward to *Boumediene v. Bush*<sup>506</sup> and Back to *Ng Fung Ho*<sup>507</sup>

The Supreme Court has yet to rule whether, post-REAL-ID, habeas corpus proceedings remain as an alternative form of review of removal

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499. *Iasu v. Smith*, 511 F.3d 881, 888 (9th Cir. 2007).

500. *Id.* at 892.

501. *Id.*

502. *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 116 (2nd Cir. 2008); *see also* Kolkevich v. Att’y Gen., 501 F.3d 323, 335 (3rd Cir. 2007) (citing to H.R.Rep. No. 109–72, at 174–75, U.S. Code Cong. & Admin. News 2005, pp. 240, 299–300).

503. *Iasu*, 511 F.3d at 893.

504. *See Ruiz-Martinez*, 516 F.3d at 105 (explaining that “the petitioner *must* file a petition for review” by the thirty-day deadline to challenge a final order) (emphasis added).

505. 8 C.F.R. § 241.8 (2010) (stating that an alien who reenters the United States after removal or returns voluntarily “has no right to a hearing before an immigration judge”).

506. 553 U.S. 723 (2007).

507. 259 U.S. 276 (1922).

orders. However, the Court has considered the availability of habeas proceedings for non-citizens who are detained at Guantanamo.<sup>508</sup> The restrictions on judicial review challenged by the *Boumediene* petitioners mirror the limitations on habeas corpus review found in the REAL ID Act.<sup>509</sup> *Boumediene v. Bush*, therefore, renews the debate on access to habeas corpus proceedings for individuals seeking review of removal orders.<sup>510</sup>

The Court addressed the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) which denied federal court jurisdiction to hear habeas corpus proceedings to enemy combatants in Guantanamo and considered whether Congress provided an adequate substitute for the writ. In the majority opinion Justice Kennedy detailed the history of the writ of habeas corpus<sup>511</sup> and determined whether relief extended to detainees at Guantanamo.<sup>512</sup> The Court noted that few cases have considered the “standards defining suspension of the writ . . . [which] confirms the care Congress has taken throughout our Nation’s history to preserve the writ and its function.”<sup>513</sup> Citing to *St. Cyr*, the Court ruled that at a minimum a prisoner must have an opportunity to defend against the “erroneous application or interpretation” of law and to obtain an order of release if unlawfully detained.<sup>514</sup>

The standards for review affirmed in *Boumediene* apply with equal force to reinstatement orders when a citizenship claim is asserted. Justice Kennedy described the writ of habeas corpus is an “adaptable remedy[,] . . . [i]ts precise application and scope changed depending upon the circumstances.”<sup>515</sup> The Court further found that habeas provides a vehi-

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508. *Boumediene v. Bush*, 533 U.S. 723, 771 (2008) (“If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”).

509. *Id.* at 803–04 (Roberts, C.J., dissenting); see also Kidane, *supra* note 179, at 143–44 (arguing that *Boumediene* implies that “enemy aliens” have rights that even some U.S. citizens do not).

510. See *Boumediene*, 533 U.S. at 804 (Roberts, C.J., dissenting) (arguing that “[i]t is grossly premature to pronounce on the detainees’ right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim”); Jennifer Norako, *Accuracy or Fairness?: The Meaning of Habeas Corpus After Boumediene v. Bush and Its Implications on Alien Removal Orders*, 58 AM. U. L. REV. 1611 (2009) (arguing that the REAL ID Act fails to comply with the “adequate and effective” standard set forth by the court in *Boumediene*).

511. *Boumediene*, 533 U.S. at 739–53.

512. *Id.* at 732. “We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.” *Id.* at 771.

513. *Id.* at 773.

514. *Id.* at 779.

515. *Id.*

cle to introduce previously unavailable evidence,<sup>516</sup> and determined that “Where a person is detained by executive order, . . . the need for collateral review is most pressing.”<sup>517</sup> Serious constitutional concerns result when Congress has structured review of removal orders so that the petition for review is the only avenue for review of reinstatement orders involving purported U.S. citizens with a claim that has not been presented and fully litigated. There are no administrative and judicial alternatives left that benefit citizen claimants in reinstatement proceedings.<sup>518</sup> *St. Cyr* and *Boumediene* remain models for ensuring adequate review of orders of reinstatement under these circumstances.<sup>519</sup>

Furthermore, the early citizenship cases, *Rogers v. Bellei* and *Ng Fung Ho v. White*, deserve consideration as to the power of Congress to limit judicial review in cases where a citizenship claim has been lodged. *Rogers v. Bellei* affirmed congressional authority to set the terms and conditions for acquisition of citizenship. Consequently, Congress decides whether a U.S. parent must have five years or ten years of presence in the United States before transmitting citizenship to a child who is born abroad. But, the Court in *Ng Fung Ho* unquestionably found that an individual with a claim to citizenship is guaranteed under the Constitution a judicial review of that claim.<sup>520</sup>

“[U]ntil the claim of citizenship is resolved, the propriety of the entire proceeding is in doubt.”<sup>521</sup> P.H. and the other acquired citizenship claimants in reinstatement proceedings have only one option if they fail to file a timely petition for review to the courts of appeals and that is a wholly discretionary request for a stay of removal from the DHS. Without the ability to rely on the writ of habeas corpus proceedings, they have no safeguard to ensure de novo review of a denial of citizenship.<sup>522</sup> No less is required or individuals who acquired U.S. citizenship truly become “second-class” citizens.

516. *Id.* at 780.

517. *Boumediene*, 553 U.S. at 783.

518. In a case involving a U.S.-citizen claimant following *Boumediene*, *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011), the Second Circuit considered the claimant’s rights to habeas review to cure a late-filed petition for review, but ruled that the petitioner had an option to file a motion to reopen his earlier proceeding before the Board of Immigration Appeals, lodge his claim, and then pursue an appeal to the court of appeals. *Id.* at 104–05. The court found, consistent with *Boumediene*, that it “must have adequate authority . . . to formulate and issue appropriate order for relief” and took the unusual step of ordering the Board to reissue a final order of removal so Mr. Luna could appeal. *Id.* at 103.

519. The *Boumediene* decision “may have immense consequences in the immigration context” states one commentator. Kidane, *supra* note 179, at 100.

520. *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922).

521. *Frank v. Rogers*, 253 F.2d 889, 890 (D.C. Cir. 1958).

522. *Boumediene v. Bush*, 553 U.S. 723, 791 (2007); *Luna*, 637 F.3d at 104–05.

## VII. CONCLUSION

Citizens are caught in the middle of conflicting goals between government efforts to adjudicate claims to acquired U.S. citizenship and the focus on crime and national security interests. The consequence is that more individuals who have yet to fully resolve their claims to U.S. citizenship are removed again and again. DHS must prioritize a mission throughout the agency to locate individuals who have claims to citizenship and provide concrete assurances that no U.S. citizen is detained or removed from the United States. The cost to each U.S. citizen who is subjected to removal is incalculable.<sup>523</sup>

Centralizing acquired citizenship claims in one CIS office benefits the claimants and the government. In one location, applications can be expeditiously processed. If adjudications were centrally located with experienced staff, CIS can quickly identify fraud issues and establish uniform standards for the evaluation of evidence which may acknowledge the lifestyle of many U.S. citizens and reaffirm a policy to consider all credible evidence, including the testimonies of witnesses. CIS has successfully centralized offices to adjudicate other benefit forms, such as applications for asylum and petitions on behalf of battered spouses.<sup>524</sup>

The government can by regulation accomplish some changes which would provide greater protection from removal for U.S. citizens. DHS, particularly law enforcement officers, should be required to screen individuals for possible citizenship claims and notify individuals who have a U.S. parent of the terms and conditions for citizenship under U.S. law. Regulations governing reinstatement of removal must provide for a hearing before an immigration judge when a claim to citizenship is evident. Furthermore, the government should rescind reinstatement orders issued against a U.S.-citizen claimant.<sup>525</sup> Department of Justice regulations

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523. Removal of individuals who may be U.S. citizens is also expensive for the U.S. government, costing at least \$12,500 per person. Cave, *supra* note 380, at A1. That does not include the amount the government has spent settling lawsuits for removing U.S. citizens. See KOHLI ET AL., *supra* note 3, at 17 n.43.

524. Affirmative asylum applications are filed with Asylum Offices where adjudicators are trained in asylum law and the social and political conditions of the countries of origin of asylum applicants. Petitions under the immigration provisions of the Violence Against Women Act (VAWA) are filed with and adjudicated by the DHS, Vermont Service Center “to ensure the appropriate and expeditious handling of all self-petitions filed by battered spouses and children.” See *CIS Issues Final Memorandum on VAWA Revocations*, 88 INTERPRETER RELEASES 286, 287 (2011) (detailing the process which guarantees that adjudicators are trained in domestic violence and are able to identify fraudulent claims).

525. The government often argues that INA § 241(a)(5) mandates reinstatements of prior deportation and removal orders, but DHS has cancelled reinstatement orders in cases in which claims to citizenship have been made. See *Minasyan v. Gonzales*, 401 F.3d 1069,

should require that immigration judges fully notify individuals in removal proceedings of the terms and conditions for U.S. citizenship and provide individuals with claims a full opportunity to present those claims.

Ultimately, full relief to U.S. citizens must come from Congress, and Congress has forgotten about U.S. citizens.<sup>526</sup> In its exercise of authority to confer citizenship under principles of *jus sanguinis*, Congress has enacted an elaborate series of statutes for the transmission of citizenship to the children born abroad to U.S. citizens. But, Congress has failed to provide the agencies charged with adjudicating claims to citizenship with all the resources needed so that claims can be expeditiously and fairly asserted. DHS and DOS are consumed with enormous caseloads and demands that hamper their ability to serve individuals with citizenship claims. Applicants must wait months or years for applications for certificates of citizenship or U.S. passports to be adjudicated.<sup>527</sup> The DOJ is inundated also with removal cases involving a population of largely detained and unrepresented individuals.<sup>528</sup>

It is time to consider the appointment of counsel in removal proceedings.<sup>529</sup> Legislation to guarantee access to counsel would offset the limitations of DHS and immigration courts in terms of providing full notice

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1073 (9th Cir. 2004) (explaining that rescission of reinstatement orders should be automatic when a claim to citizenship is presented instead of being a wholly discretionary DHS function).

526. Benson, *supra* note 26, at 1451 n.186.

527. As of September 30, 2011, the Texas Service Center has listed that an N-600 Application for Certification of Citizenship was currently at a five months wait for processing. *Local USCIS Processing Times*, VISAPRO (Oct. 18, 2011), <https://www.visapro.com/INS-Processing-Times.asp>. But, investigators for the Federal Public Defenders who assist applicants for certificates of citizenship while they are in custody pending criminal charges report that adjudications may take months or in excess of a year. Interview with Maria Rangel, *supra* note 326.

528. The EOIR is the DOJ entity that oversees the immigration courts. DONALD M. KERWIN, MIGRATION POL'Y INST., REVISITING THE NEED FOR APPOINTED COUNSEL 1 (Apr. 2005), available at <http://www.migrationpolicy.org/pubs/legalization-historical.pdf>. Within the EOIR system, "[t]he percentage of represented aliens whose proceedings were completed during FY 2006 – FY 2010 ranged from [thirty-five] percent to [forty-three] percent." *Id.* In FY 2010, there was a total of 287,207 cases seen in the immigration court system, and only 122,465 (42 percent) of these individuals had representation. DEP'T OF JUSTICE YEARBOOK, *supra* note 366, at B6, G1.

529. See, e.g., Churgin, *supra* note 370, at 172 (arguing that despite long-standing resistance to appointed counsel in immigration proceeding, as a matter of constitutional law counsel may be required in certain exceptional cases). See also Editorial, "Immigrant Detainees Deserve Lawyers," L.A. TIMES, Nov. 8, 2011, available at <http://www.latimes.com/news/opinion/opinionla/la-ed-counsel-20111108,0,2305323.story> (highlighting that the immigration detention system does not appoint lawyers to detainees, and that this includes children and the mentally ill amongst those that cannot afford legal counsel, and noting that this system is being challenged).

of citizenship under U.S. nationality laws to individuals who do not know they may have a claim.<sup>530</sup> The number of acquired citizens discovered by federal public defenders during criminal prosecutions demonstrates the need for attorneys at the earlier removal stage.<sup>531</sup> For individuals that have challenging claims, the attorney can marshal the resources needed to effectively present a claim. Furthermore, an attorney can ensure that the citizenship claimant pursues all avenues for relief, not only by presenting a fully documented application to the agencies adjudicating the claims but also by filing appeals to the AAU, the BIA, and federal courts.<sup>532</sup>

Until 1996, Congress maintained levels of administrative and federal court review of claims to United States citizenship to guarantee protection of this most precious of rights.<sup>533</sup> Then, in its efforts to deal with perceived crises in illegal immigration and crimes committed by non-citizens, it dismantled some of the most basic avenues for review of removal orders and authorized an expansive and wholly administrative reinstatement of removal. Congress should amend INA Section 241(a)(5) to limit the authority of low-level DHS officials and ensure that all citizenship claims are heard in INA Section 240 removal proceedings. INA Section 360 should be extended to include review of citizenship claims which arise in removal proceedings and Congress must reestablish habeas corpus proceedings for individuals who assert viable claims to citizenship but are who unable to file a petition for review. Until Congress restores avenues for asserting claims to citizenship before immigration judges and for

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530. See Family, *supra* note 360, at 568 (stating that “[t]o adjudicate a removal case effectively, the system also needs lawyers”); Taylor, *supra* note 370, at 1666 (observing that “there can be no doubt that attorneys influence the outcome of removal proceedings, especially in circumstances where an alien has a viable ground to contest deportation or is eligible for some form of relief”).

531. See *supra* note 371.

532. Attorneys make a difference in the “labyrinthian, complex and confusing” removal process facing U.S.-citizen claimants. See Medina, *supra* note 145, at 334 n.103 (explaining that there are a number of strategies that counsel can follow to assist a detained individual with a claim to citizenship). See BALDINI-POTERMIN, *supra* note 225, at §§ 5:11–5:15 (including a comprehensive guide for attorneys representing individuals in removal proceedings). In some cases counsel can successfully and almost immediately obtain the client’s release. *Id.* Depending on the strength of evidence, DHS counsel may agree to terminate the removal proceeding without further hearing. *Id.* If DHS does not agree to terminate, counsel can file on behalf of the client an application for certificate of citizenship, N-600, with CIS or an application for U.S. passport before the Department of State, and seek a termination of the removal proceeding when the applications are approved. *Id.* Alternatively, counsel can present evidence of the citizenship claim to the immigration judge as part of a motion to terminate.

533. See *supra* Part IV.



review of claims in federal districts courts, U.S. citizens will continue to be removed without full access to the means to assert and review their claims. The result marks “one more blight in our Nation’s history.”<sup>534</sup>

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534. *Hearing*, *supra* note 8, at 1.